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IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 342

HARRY J. WILSON, LUCY WILSON, SEBASTIAN C. BRACEY, ALMA D. BURGUM, EARLE B. BURGUM, NORMA JOYCE, CALEB W. JOYCE, DAVID OLIVER DENNIS, JEAN D. DENNIS, NORMAN E. A. PERRY, AGNES M. MAZZEI,

Petitioners,

vs.

THE CITY OF LONG BRANCH, a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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No.

HARRY J. WILSON, LUCY WILSON, SEBASTIAN C. BRACEY, ALMA D. BURGUM, EARLE B. BURGUM, NORMA JOYCE, CALEB W. JOYCE, DAVID OLIVER DENNIS, JEAN D. DENNIS, NORMAN E. A. PERRY, AGNES M. MAZZEI,

Petitioners,

vs.

THE CITY OF LONG BRANCH, a municipal corporation,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

To the Honorable, the Chief Justice and the Associate Justices, of the Supreme Court of the United States:

Harry J. Wilson, Lucy Wilson, Sebastian C. Bracey, Alma D. Burgum, Earle B. Burgum, Norma Joyce, Caleb W. Joyce, David Oliver Dennis, Jean D. Dennis, Norman E. A. Perry, Agnes M. Mazzei, the petitioners herein, pray that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of New Jersey affirming the judgment of the Superior Court, Monmouth County, State of New Jersey, dismissing the complaint of the petitioners.

Official and Unofficial Reports of the Opinions Delivered in the Courts Below

The Opinion of the New Jersey Supreme Court is officially reported in 27 N. J. 360. It is unofficially reported in 142 A. 2d 837.

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

The date of the judgment sought to be reviewed is June 16, 1958. The time of the entry is June 26, 1958. Jurisdiction of this Court is invoked under *Title 28, United States Code* 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * (3) By Writ of Certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

Questions Presented for Review

1. Were the petitioners deprived of their property without due process of law and just compensation therefor when they were denied a judicial determination that the purpose was for public use?

2. Was due process of law denied to the homeowners in the statutory hearing, with the requisite of substantial evidence, by the refusal of process of subpoena and right of cross examination and the consideration of undisclosed reports and documents?

3. Are the statutes of New Jersey unconstitutional which authorize a municipality to declare an entire area blighted but permit the taking of only a portion thereof without the redevelopment of the entire area?

4. Were sufficient and adequate standards prescribed by the statutes to regulate the exercise of the power delegated to the municipality to deprive the petitioners of their properties?

5. Are the statutes of New Jersey constitutional which authorize the municipality to declare that the homes of the petitioners are in a blighted area but do not require the municipality to pay compensation to the owners for the damage suffered by such declaration?

6. Did the statutes deny to the petitioners equal protection of the laws by the provision that the municipality bear the cost of relocation of the property, of public utilities and common carriers, which was denied to the petitioners?

The Statutes Involved in the Case

The statutes involved are *N.J.S.A.* 40:55-21.1 *et seq.* and *N.J.S.A.* 55:14A-31 to 39. These are set forth verbatim in the Appendix.

Statement of Facts

The petitioners are the owners of their homes which are situated in the City of Long Branch. The Petitioners, Harry J. Wilson and Lucy Wilson, in addition to their home, own and operate a boat works. In 1955 the City of Long Branch instituted through the Planning Board of the City proceedings which resulted in a declaration by the governing body of the City that the petitioners' homes were located in a blighted area. The petitioners who had previously filed written objections in accordance with the

statute, instituted proceedings for the review, provided by the statute, in the Superior Court. The Superior Court refuse to accept any evidence pertaining to the existence of blight and heard only that evidence relating to the technical aspects of the proceeding before the Planning Board. The action of the Superior Court was affirmed by the New Jersey Supreme Court. Notwithstanding the provisions of the statutes which required a notice of a hearing to property owners, the holding of a hearing at which parties would be heard and the requirement of substantial evidence, the various municipal bodies, five years before, had initiated steps to declare the area blighted. In 1950 the Housing Authority determined that the area was blighted and should be redeveloped (R. 153). In July 1951 the Planning Board caused its Chairman to issue a letter that the area was blighted. The Vice-Chairman of the Planning Board in July 1951 accompanied the executive officer of the Housing Authority to Washington to secure from the Federal Housing and Home Finance Bureau an allocation of funds to redevelop the area (R. 295). At the same time the governing body of the City authorized the Mayor to write a letter that the area was blighted (R. 299). On March the 6th, 1953 the Housing Authority, the Planning Board, and the City Commission held a joint meeting to review plans for the redevelopment of the area (R. 312). All three bodies had predetermined the existence of blight in the area several years before the statutory proceedings were initiated.

The topographical and geographical characteristics of the area are important. The City is bounded on the north by the South Shrewsbury River. The area itself is located between Atlantic Avenue and the River with at the eastern end an inclusion of additional territory. The area is a narrow strip of land extending over 3000 feet from west to east. Coves and creeks divide the area into three dis-

tinct geographical sections. The westerly section in which the majority of the petitioners reside, is residential, excepting for two boat works located on the River. The central section is bounded on either side by the coves or creeks. This consists principally of vacant land, a large portion of which is owned by the City. The most easterly section is completely separated from the westerly and central sections by a wide creek known as Troutman's Creek. A large area of this section had been acquired by the City which had erected thereon, 23 buildings for emergency housing under the Lanham Act. These buildings were removed during the course of the proceeding.

According to the report known as the Candeub Report which was offered at the hearing, the gross area consisted of 97 acres, of which 8 acres are in public rights of way, 51 acres in residential use, 2.1 acres in commercial use, 24.8 in public or semi-public use and 11.1 acres vacant land. 70 residential buildings are located in the area of which 23 were the City constructed and owned Lanham Act or emergency houses, which were demolished during the course of the proceeding. There thus remained 47 residences. The Report declared that 20 of these 47 were substandard. During the course of the proceeding, 2 of these were removed and 5 altered and repaired (R. 18 and 19). The petitioners vigorously controverted the Candeub Report. The Superior Court refused to receive evidence upon this point. If the Candeub Report is taken at its face value of the 47 residences remaining on the property after the demolition of the emergency housing, there remain only 13 classed by Candeub as substandard which is not a generality of condition. The existence of 47 dwellings upon a net area of 89 acres indicates a sparsely settled area. There was no claim that the area was a slum area. The principal claim of blight rested upon the age and obsolescence of the residences and existence of the vacant land.

The public hearing required by the statute was held. The attorney for the petitioners was denied the right to complete his cross examination of the consultant employed by the Housing Authority. Process of subpoena to compel the attendance of City Officials was denied (R. 14). The Planning Board had received a report of the Community Planning Associates Inc. upon the area, but determined not to divulge this report or call its author to testify (R. 286). City Officials were called as witnesses and refused to testify. Other witnesses refused upon advice both of the Board or its attorney to submit to cross examination. The requisites of a fair and open hearing and the introduction and consideration of evidence were not afforded the petitioners. The hearing was farcical and in accordance with the proofs that the various Boards of the City had long before predetermined to declare the area blighted. No consideration was given to the geographical divisions, the water barriers, and the acts of the City which controlled a great portion of the area.

The Planning Board of the City was formed of nine members. At the meeting when blight was determined, four members voted for, two against, two abstained from voting and one was absent. Only four of nine members voted to declare the area blighted. The City thereafter affirmed the resolution of the Planning Board. The petitioners then filed a complaint in accordance with the statute to "have a determination that an area is a blighted area reviewed by the Superior Court of New Jersey by procedure in lieu of prerogative writs". The trial court ruled that the petitioners could offer no proof concerning the character of the area (R. 246-249). The petitioners and other residents were prepared to offer evidence that the interior of the buildings had not been inspected and that the buildings were maintained as respectable homes and residences. The trial court dismissed the complaint with an opinion

which held that the City had acted in accordance with the statute. The trial court held that in accordance with the provisions of the opinion by the same court, the statute was constitutional. The New Jersey Supreme Court on appeal affirmed the trial court. As part of its opinion, the Supreme Court quoted extensively from the report of the consultant, which had been controverted and with respect to which full cross examination was denied. The trial court had refused to receive any evidence and controversion of this report. The petitioners now own their properties in an area declared blighted by the municipality. No compensation is provided by the statute for the damage sustained by them through this municipal action. The statute permits the City to proceed no further and affords no recompense to the petitioners if the City so elects to do.

Concisely, the facts of this case are (1) the area is divided into three separate and distinct portions by coves or estuaries of the River; (2) the westerly portion contains no City-owned lands, no tax delinquincies and, with the exception of two boat yards, is entirely residential; (3) the central portion is principally vacant land, a large portion thereof is owned by the City; (4) the easterly portion contains large tracts of vacant land and a large tract owned by the City, upon which the City had constructed, and during the course of the proceeding removed, 23 emergency housing structures; (5) the City and the Planning Board had determined in 1951, four years before the hearing, to declare the area blighted; (6) undisclosed reports were received by the Planning Board; (7) the Planning Board refused the petitioners the right of process of subpoena and the right of cross examination at the hearing notwithstanding the statutory requirement of substantial evidence; (8) at the trial provided by the statute for a review of the determination of the blight, the offer of the petitioners to introduce evidence controverting the consultant's report

and pertaining to the condition of the area was refused. Under these facts, the petitioners have never had a judicial determination of blight, or a fair and open hearing, or a finding based upon substantial evidence.

The Stage in the Proceedings and the Manner in Which Federal Questions Were Raised

Petitioners filed an action in the Superior Court of New Jersey to review the determination. Paragraph 15 of the complaint (pp. 4, 5 and 6) by subsections recited that the statutes and proceedings were unconstitutional in that [B the action violated the Fifth and Fourteenth Amendments of the United States Constitution], [C neither proper notice nor due process of law was provided for the taking of private property which was contrary to the Constitution of the United States], [D taking of private property was permitted without due compensation for the diminution in value of property by reason of the declaration of blight], [G no proper standards were set up for determining that the property within the area was blighted], [I the failure to require the municipality to acquire and pay for the property is unconstitutional], [J the right given to private persons to acquire by eminent domain private property for private use is unconstitutional], [Q proceedings were unconstitutional because no opportunity was afforded the plaintiffs to examine witnesses or produce evidence] (pp. 4, 5 and 6). The pretrial order restated the Federal questions (pp. 14, 15 and 16). The trial Court in its opinion passed upon the questions and held the statute constitutional (p. 33) [Opinion of Ewart, J. S. C. at the trial]. The New Jersey Supreme Court on Appeal passed upon the Federal questions under Point I, "The Issue of Constitutionality", subsections (b), (c), (d) and (g). The portions of the complaint, the pretrial order, the opinion of the Court and the opinion of the Appellate Court are printed in the appendix.

ARGUMENT

POINT I

The question whether the properties of the petitioners are for a public use is a judicial one.

New Jersey by its Constitution, N. J. Constitution of 1947, Article 8, Section 3, Paragraph 1, and by the statutes has determined that the elimination of blight and the redevelopment of blighted areas is a public policy of the State. By statute the State has conferred upon municipalities the power to condemn properties within blighted areas in the furtherance of redevelopment of those areas. Power of expropriation of private property as prescribed and limited in the statutes and Constitution adopting the principal may be exercised against properties in an area duly found to be blighted. This power cannot be exercised against properties which are not in a blighted area. The public use of these properties only arises when the condition of blight is found. The taking of property for a public use depends primarily upon the determination that these properties are in a blighted area. The first essential step, therefore, is the determination of what is the public use of the properties to be taken. Until this question of what is the public use of these properties has been decided, the right of eminent domain and expropriation is ineffective. This Court has established by repeated decisions the principle that the determination of what is a public use is a judicial one.

Had the State of New Jersey enacted a statute empowering a municipality to condemn lands for an artesian water supply for municipal water works, the right to condemn would depend upon the existence of an artesian water supply. The municipality could not arbitrarily, through any of its administrative agencies, declare that the prop-

erty was for artesian wells and condemn it, if the property contained a deposit of granite or in actuality was a granite quarry. The existence of an artesian supply of water would be a judicial question to be determined before the municipality could condemn under such a statute. Likewise, if the municipality were empowered to condemn lands upon which existed a supply of gravel for the surfacing and constructing of its roads, the municipality would have no power to condemn clay lands, marl lands or silica lands. The determination of whether the lands were for a public use would be a judicial one.

So in the instant case, what is the public use of the petitioners' lands, is for judicial determination. Until there has been a judicial determination that the homes of the petitioners are within a blighted territory, there has been no determination that the expropriation of these homes is for the public use. These homeowners are entitled to the full protection of the Federal Constitution. They stand in an unusual position. Justice BRENNAN, speaking for the New Jersey Supreme Court in *American Salvage Co. v. Housing Authority of Newark*, 14 N. J. 271, 102 A. 2d 465, said at page 279:

> "It must be emphasized that the owner of land taken by eminent domain stands in a far different position from that of a defendant in an ordinary law suit. The latter has usually 'brought the trouble upon himself, if he is liable at all, by breaking a contract or committing a tort.' The owner of lands taken in condemnation, on the other hand, is in his predicament only because 'he happens to own available land.'"

The public use under which the municipality claims it has the right to condemn, is the redevelopment of an area asserted to be blighted. The public use is the elimination

of blight. If there is no blight, then there is no public use. The essential requisite that empowers the municipality to proceed by eminent domain is whether the lands are for the public use. The taking of these homes, therefore, depends on the issue whether they are for the public use which, in turn, is predicated upon whether or not the area is blighted. As night follows day, so follows the premise that the existence of blight determines whether there is a public use. These homeowners are entitled to a judicial determination of this question. Once the determination of what is the public use of these lands is made, then the extent of taking is a legislative or administrative function. Until the question of what is the public use of these lands is decided, the legislative bodies of the municipality are powerless to act.

In *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 52 L. ed. 637, 28 S. Ct. 331, this Court reviewed the right of a railroad to condemn lands for a spur track serving an industry. Evidence was considered of the use to which the spur track was to be put, the service which would be rendered and the people who would be served. The Court, after considering all this evidence, determined that the land upon which the spur track was to be constructed was for public use. In the Opinion, this Court said:

> "The one and only principal in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question." (U. S. 606 L. ed. 641)

In *Sears* v. *Akron*, 246 U. S. 242, 62 L. ed. 688, 38 S. Ct. 245, this principle is affirmed:

> "It is well settled that while the question whether the purpose of a taking is a public one is judicial, the necessity and the proper extent of a taking is a legislative question." (U. S. 251 L. ed. 698)

In *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700 67 L. ed. 1186, 43 S. Ct. 689, landowners contested condemnation proceedings instituted by the County for the alleged purpose of building a road. The landowners claimed that the road had no terminus or destination, but terminated within the boundaries of their lands. Evidence was received of the use to which the road was to be put and the probable members of the public who would use it. This Court made the determination that the taking was for public use.

> "The nature of a use, whether public or private, is ultimately a judicial question." (U. S. 705 L. ed. 1192)

The Court in the Opinion clearly distinguishes between the determination whether a taking is for the public use or whether the extent of the taking is necessary. If the taking is for the public use, then the extent is a legislative question. The question of public use remains a judicial question.

In *Cincinnati* v. *Vester*, 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360, the City of Cincinnati under legislative authority instituted condemnation proceedings for the widening of streets under a statute which permitted the City to take more lands than necessary for the widening. Evidence was received concerning the purpose of taking the additional lands. Proof was offered that the City intended to re-sell some of these lands to help defray the cost of the improvement. Chief Justice HUGHES for an unanimous Court affirmed the decrees enjoining the taking:

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative

declarations and in particular the judgements of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution." (U. S. 446 L. ed. 955).

In *United States Ex Rel. T. V. A. v. Welch*, 327 U. S. 546, 90 L. ed. 843, 66 S. Ct. 715, the right of the T. V. A. to take lands for the purpose of exchanging such lands for highways and other lands necessary for the development was before the Court. Evidence was admitted that in the creation of the development State highways and roads would be taken. Agreements between the State and park authorities that an exchange would be made of lands proposed to be condemned for the lands taken were admitted. All this evidence was reviewed by this Court. This Court reaffirmed the principle that the question of what is a public use is a judicial one. It affirmed the right of the Authority to take the lands upon the ground that Congress had declared that the taking was for the public use. See also: *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. ed. 510, 57 S. Ct. 364.

In New York this principle has been followed in redevelopment. In *Beebe Improvement Corp. v. City of New York*, 129 N. Y. S. 2nd 263, the Court held that the land owners were entitled to introduce evidence that the areas in question were not in fact blighted.

"After careful consideration I am constrained to hold that such an attempt may have been presented — that the action taken by the Planning Commission and Board of Estimate, may well, on trial, be found to be arbitrary and capricious and the proposed project or plan not contemplated by the statute under which it is proposed." (p. 267)

"If the actions of the defendants are to be upheld, is must be upon the ground that the area is sub-standard and insanitary."

* * *

"I therefore conclude that it may be demonstrated on a trial that the city is here attempting to stretch the concept of 'area' in order to seize private property for a purpose which, laudable as some may consider it, is not within the powers conferred by the Constitution and statutes of the state. A trial of the issues is accordingly necessary to enable the Court to determine whether or not the governmental agencies involved have acted in a capricious or arbitrary manner and applied a statute to a situation to which it was never intended to have application."

In *Diehm* v. *City of New York*, 143 N. Y. S. 2nd 298, the Court said:

"It must first be determined if this is a plan for the clearance, replanning, reconstruction and redevelopment of a substandard and unsanitary area as contemplated by Article XVIII of the Constitution." (p. 301)

In *Bristol Redevelopment and Hous. Authority* v. *Denton*, 198 Virginia 171, 93 S. E. 2d 288, the Plaintiffs claim that the area was not in fact blighted was sustained. At the trial the Court received testimony going into the merits of the question of whether or not the area was blighted. The Court said:

"On the other hand, legislative conclusions based on findings of fact are not immune to Judicial review where they are arbitrary and unwarranted."

The State of New Jersey has not declared that private property may generally be taken for public use for rede-

velopment purposes but the State has imposed a restriction that only that private property which is in a blighted area may be expropriated. It is only such property that may be used. The determination whether property is in a blighted area is a determination whether the property is for the public use. The petitioners have not been afforded the right of a judicial determination that their properties are within a blighted area.

POINT II

Due process of law, the right to a fair and open hearing, was denied the petitioners.

Long before these proceedings were initiated, the City of Long Branch had determined to take the properties of the petitioners. The record is replete with proof that the municipal authorities acted arbitrarily and predetermined before the institution of any proceedings that the lands of the petitioners would be taken for redevelopment. The Housing Authority of the City of Long Branch, the Planning Board of the City of Long Branch, and the governing body of the City, as far back as 1951, by resolution determined that the area was blighted. Such action before the statutory proceedings were initiated is indicative of the necessity that the safeguards of the Fourteenth Amendment be afforded these homeowners. The New Jersey statute provides for a hearing and for the introduction of substantial evidence to support a determination that an area is blighted. Objectors are given the right to review the determination in an action in the Superior Court. The statute in providing for a hearing was in compliance with the decisions of this Court that neither liberty of person nor property may be taken without due process of law.

Repeated decisions of this Court have held that due process of law grants to the person whose liberty or prop-

erty is affected, the right of presenting evidence and the right of cross examination of the witnesses confronting him at the hearing. Such due process of law was denied the petitioners. Process of subpoena to produce the evidence of City Officials was refused. If a condition of blight was a direct result of the City's own acts, it may well be that the City was estopped under general rules of equity from expropriating the property of these petitioners who have maintained their homes. This proof was important. Likewise, if the act of the City over a period of years in refusing building permits to authorize the improvement and enlargement of the buildings within the area had contributed to the condition, the City again may well have been estopped by its action.

The Planning Board accepted but by motion determined not to make public a report from a consultant. It further determined to refrain from placing the consultant on the stand. Secret evidence was thus introduced. The right of cross examination of witnesses was denied. This is peculiarly significant since the New Jersey Supreme Court in its Opinion quoted at length from a report which had been prepared in the instant case by a consultant at the instructions of the Housing Authority. The facts in this report are controvertible. The petitioners endeavored to offer proof that the facts in the report were not true. An endeavor was made to offer evidence that the maker of the report had never inspected the buildings. A citizen who had inspected the entire area was denied the opportunity of testifying at the review provided by statute before the Superior Court (R. 249).

It is to be remembered that all three bodies of the City had, in 1951, declared that the area was to be redeveloped. Four years later in 1955 at the hearing the property owners were refused the opportunity to examine evidence and

reports in the hands of the Planning Board; they were denied the opportunity by process of subpoena of producing City Officials and City records. It is suggested that the action of four members of the nine of the Planning Board may well have been overruled by the remaining members, two of whom voted against the finding, two of whom refrained from voting and one who was absent, had the petitioners been afforded a fair and open hearing.

This, it is submitted, was a denial of the constitutional right of due process of law when their homes were to be expropriated.

Yamataya v. *Fisher*, 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends,—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to

be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." (U. S. 100 L. ed. 725)

In *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 68 L. ed. 667, 44 S. Ct. 317, Justice BRANDEIS said:

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." (U. S. 265 L. ed. 674)

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. ed. 1033, 56 S. Ct. 720:

"When the legislature itself acts within the broad field of legislative discretion, its determination are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. * * *

"The principal applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged." (U. S. 81 L. ed. 1041)

Petitioners as of this date are not cognizant of the contents of the report of Community Planning Associates, Inc. which the Planning Board resolved to keep private. Such procedure has been directly condemned by this court. In *Ohio Bell Teleph. Co. v. Public Utilities Com.*, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724, this Court held that due process was violated when a legislative commission made a secret investigation in reaching its conclusion.

> "From the standpoint of due process—protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out." (U. S. 302 L. ed. 1100)

The petitioners are faced with the deprivation of their homes. They were entitled to be confronted with all the evidence considered by the Planning Board and to offer evidence in opposition thereto and to test the credibility of the evidence received by the Planning Board. The denial of these rights to them has been condemned in *Morgan v. United States*, 304 U. S. 1, 82 L. ed. 1129, 58 S. Ct. 773, where an order was made by the Secretary of Agriculture fixing rates to be charged by market agencies. The statute empowering the order provided for a hearing.

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and

> open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (U. S. 14 L. ed. 1130)

In *National Lab. Rel. Bd.* v. *Indiana & M. E. Co.*, 318 U. S. 9, 87 L. ed. 579, 63 S. Ct. 394, the requisites of a finding of an administrative board are discussed:

> "Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." (U. S. 28 L. ed. 592)

The Supreme Court of New Jersey heretofore has directly adopted the requirements of a hearing declared by this court. The statute of New Jersey now under review prescribed a hearing. In *Handlon* v. *Town of Belleville*, 4 N. J. 99, 71 A. 2d 624, 16 A. L. R. 2d 1118 the same requirements are placed upon a hearing:

> "The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936); *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160, 83 L. ed. 111 (1938); *Pennsylvania R. R. Co.* v. *New Jersey Aviation Commission*, 2 N. J. 64 (1949). The quality of the act rather than the character of the agency exercising the authority is determinative of the nature of the power and the need for procedural due process. Where the adminis-

trative tribunal is under a duty to consider evidence and apply the law to the facts as found, thereby exercising a discretion or judgment judicial in nature on evidentiary facts, the function is ordinarily *quasi*-judicial and not ministerial. The classification depends upon the nature of the act and the controls placed upon the exercise of the power in the legislative grant * * * " (p. 105)

Numerous New Jersey cases have held that the right of cross examination is preserved and that matters outside the record may not properly be considered. *Abbotts Dairies* v. *Armstrong*, 14 N. J. 319, 102 A. 2d 372; *Giordano* v. *City Commission of the City of Newark*, 2 N. J. 585, 67 A. 2d 454; *N. J. State Bd. of Optometrists* v. *Nemitz*, 21 N. J. Super. 18, 90 A. 2d 740, commencing at page 28; *Carbone* v. *Atlantic Yachting Co.*, 14 N. J. Super. 269, 81 A. 2d 799 and *National Dairy, &c., Co.* v. *Milk Control Board*, 133 N. J. L. 491, 44 A. 2d 796.

Under New Jersey law the right of review before the Superior Court entitled the petitioners to submit original proof. This right was denied. Due process of law, in the taking of private property is granted by the Fourteenth Amendment, but was never accorded as required by the Fourteenth Amendment. The hearing before the Planning Board was circumscribed by its arbitrary action. The denial of the right of examination of the witnesses presented by the Planning Board and the Housing Authority, the acceptance of secret reports unrevealed to the petitioners, and the acceptance of reports upon which no cross examination was permitted, was complete denial of the right of due process. These petitioners face the loss of their homes and have had no opportunity to offer evidence that a complete survey of the area reveals no blight; that the City itself is estopped from declaring blight be-

cause the City itself has created the condition; that the area is geographically divided into three separate and distinct areas and not properly one area; that the reports filed openly contained erroneous representations made without an actual inspection of the buildings within the area.

POINT III

When legislation enacts a new pattern of control of property by an administrative body, standards for the exercise of this power of abrogation of ownership of property are necessary.

The New Jersey statute empowers a municipality to deprive persons of their property located in the municipality when the statutory procedure is followed. The act purports to set forth standards defining the term "blighted area". Five categories of conditions are designated. The act, N.J.S.A. 40:55-21.1, provides:

> "The term 'blight area' shall mean an area in any municipality wherein there exists any of the conditions hereinafter enumerated."

The standards which follow describing the conditions relate only to the existence of these conditions but in no way to the extent of these conditions. The effect of this section is to delegate an unbridled, arbitrary power to the municipality and its planning board at its whim, wish and desire to lay out any area up to and including the whole municipality as blighted if one or more of the conditions exist. The act permits the declaration that an entire city is blighted if there is therein unimproved, vacant land deemed not likely to be developed by the instrumentality of private capital for the reasons set forth in the statute. There is

no limit upon the territory of a municipality which may be declared blighted if there exists therein two or more buildings previously used for industrial purposes which have been abandoned and fallen into disrepair.

In the present case the New Jersey Supreme Court in its opinion recited statements from a report filed by a consultant upon which no cross examination was permitted. Even from the facts stated by the court and from the maps filed, it is apparent that in the westerly portion of the tract clearly defined by the water barrier of an estuary, there was no generality of the buildings as substandard, unsafe or insanitary within the terms of the standards set forth in the statute. There were no buildings previously used for industrial purposes which had been abandoned. There was no unimproved, vacant land in the westerly portion. There were no slum areas. There was not a growing lack of proper utilization of the areas. The statute permits the Planning Board and the governing body of the municipality without limit as to the area to include therein a wide expanse of property. The westerly section clearly defined on the maps extends along the road for fifteen hundred feet. It is divided from the remainder by a large cove or creek. Nothing in the act prevents the arbitrary determination that this separate integral unit should not be thrown into an area where there is vacant land or undeveloped land. So far as standards appear in the act, the municipality may include in the area the finest residential section of the city without fear or challenge. The act therefore gives a license without restriction and without limit to deprive persons of their property, this notwithstanding that the vast portion of the area may be the finest residential area in the city.

When a novel method of legislation effecting the liberty and property of persons is introduced, it is essential that

that legislation contain therein proper and restrictive standards to safeguard the constitutional guarantees granted by the 14th Amendment. In *Schechter* v. *U. S.* 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, this court held that the establishment of standards is necessary for legislation to be constitutional when authority is granted to either officials or administrative bodies to effect either the liberty or property of persons. To the same effect, see *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; *Lichter* v. *U. S.*, 334 U. S. 742, 92 L. ed. 1694, 68 S. Ct. 1294.

New Jersey has recognized the requirement that an administrative agency to which is delegated the power to regulate liberty or property of individuals must be controlled by reasonable adequate standards in *Van Riper* v. *Telephone Workers Federation of N. J.*, 2 N. J. 335, 66 A. 2d 616; *N. J. Bell Telephone Co.* v. *Communications Workers*, 5 N. J. 354, 75 A. 2d 721; *Ward* v. *Scott*, 11 N. J. 117, 93 A. 2d 385. The New Jersey Supreme Court in its opinion did not discuss the contention that it was necessary to impose a standard which would govern and control the limitation of the area by the administrative body. It treated the argument on the basis that the petitioners were claiming isolated properties should not be included in the area. The petitioners are not claiming this. The petitioners assert that a large tract of land has no relation whatsoever to the remainder of the area, is separated by a water barrier and is not contiguous. The petitioners claim that the act violates the constitutional guarantees in setting up no standard to protect property owners in sections which are remote from a section where blight may be found.

POINT IV

The Statutes are unconstitutional in that they permit a taking of property without compensation to the owners thereof.

The Statutes of New Jersey are *sui generis*. Research has disclosed no similar statute which permits the governing body of a municipality to describe the area in which private property is located as blighted and then pay no compensation for such act. The statute, after providing the procedure by which a blighted area may be designated, gives the amazing authority to the municipality that it shall not be required to acquire the property and proceed with the clearance. The legislature has no power by statute to deprive the land owners of inherent benefits and ordinary enjoyment of their properties except by just compensation. This act authorizes a municipality to declare the property of these home owners blighted and makes no provision for compensation for the damage sustained by such declaration.

The declaration of blight is an act which depreciates and diminishes the value of property. It is in no way similar to laying out highways to be established in the future which act in itself may increase but in no way diminish the value of property. When the highway is established, the property owner is then entitled to the market value of his land which may be taken. The declaration of blight is a monetary stigma attaching to property which depreciates the value thereof. It is an official declaration under the statute that the property is contiguous to obsolescent, insanitary dwellings, abandoned buildings, unimproved land areas which contain factors detrimental to the community. The mere recital of blight is a deprivation to the land owner of a portion of the value of his

property as it existed before the declaration. For this the statute gives no compensation. The property owners, as many in the present case, may have devoted their time and resources to maintaining their property in excellent condition. The immediate properties surrounding may be in similar excellent condition. The municipality is empowered to declare the property within a blighted area and then do nothing further.

In *Pennsylvania R.R. Co. v. Angel*, 41 N. J. E. 316, 7 A. 432, Justice Dixon for the Court of Errors and Appeals said:

> "An act of the legislature cannot confer upon individuals or private corporations acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the Constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable." (p. 329)

In *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335, the court said:

> "The destruction of private property, either fotal or partial, or the diminution of its value by an act of the government, directly, and not merely incidentally affecting it, is a taking within the meaning of the constitutional provision, and the power can only be exercised under the right of eminent domain, subject to the constitutional limitation of making just compensation." (p. 343)

In *Glover* v. *Powell*, 10 N. J. E. 211, a dam had been erected to safeguard farm lands from flooding by tide water. The legislature determined to remove the dam. The court said:

> "The value of the meadow is destroyed by the execution of the law in question, and thus may be said, with propriety, to be taken from the owners. A partial destruction, a diminution of their value, is the taking of private property. This act cannot be carried into effect without a violation of the constitution of the state." (p. 229)

Damage to property has been held to ensue from a statement that a house thereon is haunted, *Manitoba Free Press Co.* v. *Nagy*, 39 Can. S. C. 340; that the iron ore in a mine was becoming exhausted, *Paul* v. *Hafferty*, 63 Pa. 46; that articles manufactured infringed patent rights, *Andrew* v. *Deshler*, 45 N. J. L. 167.

The City of Long Branch by municipal action has declared the properties of the petitioners to be in a blighted area. The official act of a municipality has caused a diminution in the value of the properties directly and not merely incidentally affecting properties which deprive the owners of the ordinary use. This is a taking within the meaning of the constitutional provision. The statute does not require the taking. On the contrary, the municipality is empowered, after the governmental act of diminishing the value of the properties, to do nothing further. The New Jersey Supreme Court likened the instant case to the filing by a governmental body of a map of a proposed highway. There is no analogy between the proposed location of a highway, which by its very nature, may well increase the value of the lands and the official declaration that property is within a blighted area. The act is unconstitutional in that it permits governmental action to

diminish the value of property without providing compensation therefor. The act is further unconstitutional in its failure to provide that the municipality after declaring a property in a blighted area, diminishing its value and so taking it, shall forthwith by eminent domain acquire the property and pay to the owner just compensation therefor. During this period of time the governmental body has interfered with the owner's use of his property. The ability to lease property in blighted area has been harmed. The right to improve the property has been damaged with the declaration of blight, practically every indicia and right of ownership has been affected.

The statute of New Jersey stands alone in the unconstitutional right given to the municipality to declare property to be within a blighted area and incur no obligation to proceed to acquire the property either by purchase or eminent domain. The property owners are left without remedy in the event the municipality, as the statute provides "shall not be required" to proceed with the redevelopment.

POINT V

The Statute denies to the petitioners the equal protection of the laws.

The municipality is empowered to acquire by purchase or eminent domain proceedings the real property within the area. The owners have their homes expropriated without provision to cost or expense of relocation. The same statute forbids the municipality to exercise its power of eminent domain against the property or interests in property either owned or used by any public utility. If the municipality shall determine that the retention of the property will interfere with the plan, then the public utility may be ordered to remove and relocate this property. The cost and expense of the removal and relocation must be borne by the municipality.

The home owner is discriminated against by this provision of the statute in favor of the public utility. The power of eminent domain cannot be exercised against the public utility. If the municipality determines that the existence of the public utility use of property interferes with the plan, then the cost of moving and relocation of the public utility must be borne by the municipality. On the one hand the owner of his home is subject to the power of eminent domain, must remove from the property at his own expense and at his own expense must secure another home and pay the cost of relocating his family there. The public utility is exempt from this power of eminent domain. It is not subject to the cost of removal or the cost of locating new sites for its structures. The office of a public utility has no more sacred rights than a store or other business building or indeed the boat works owned and occupied by two of the petitioners. The office building of the public utility is free from condemnation. If the public utility is ordered to remove therefrom, the cost of relocation must be borne by the municipality.

This discrimination is a denial of the equal protection of the laws granted in the Fourteenth Amendment to the home owner. In *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, at page 263 the court held:

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Also see *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252; *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; *Hartford Steam Boiler Insurance Co.* v. *Harrison*, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838.

POINT VI

Diverse issues are presented in this case which are not considered in *Berman v. Parker*, 348 U. S. 26.

The Supreme Court of New Jersey quoted at length from the decision of this Court in *Berman v. Parker*, 348 U. S. 26, 99 L. ed. 27, 76 S. Ct. 98. It is submitted that the issues presented in this petition are distinct and diverse from those considered in that case. The substantial issues in the *Berman v. Parker* case were: (a) The right to include within a blighted area a property which itself does not imperil the health or safety or contribute to the making of a slum or blighted area as part of the redevelopment of the area. (b) The right to take the business property of a citizen in a redevelopment area and in the redevelopment scheme permit its transfer to another. (c) The right to take property in a redevelopment area and thereafter permit the property owner to repurchase it for redevelopment in harmony with the plan. (d) The right to take private property for redevelopment purposes to be carried on by private capital.

The opinion of the District Court was reported in 117 F. Supp. 705. The opinion of Judge PRETTYMAN reviews extensively evidence submitted relating to the character of the area. No question appears in either opinion challenging the finding that the area itself was a blighted or slum area. The essential question determined was a constitutionality of the act which permitted to be included within the slum area property and buildings which did not contribute to the condition.

The statute did not, after the declaration of the area and the finding of the existence of the condition, permit the authority to abandon the project. The statute specifically provided that the agency shall proceed upon such cer-

tification of the exercise of its powers for the acquisition and assembly of the real property within the area.

In the opinion of the lower court there is clear indication that the right to condemn the property by eminent domain depended upon the first phase of determining that a slum existed.

The Supreme Court in its opinion held that the exercise of eminent domain to eliminate slum areas was constitutional. The Supreme Court explicitly ruled against the right of individual property owners to exempt individual properties from the area. The principle that the judiciary had the jurisdiction to determine whether the power of eminent domain was being exercised for a public purpose was reaffirmed. No argument appears to have been made either in the District Court or in the Supreme Court that the property owner was deprived of the right of a judicial determination or of due process of law in the denial of a fair and open hearing and of confrontation of the witnesses in evidence and of the right of controverting such evidence.

The case determines that redevelopment projects are within the police power, that properties that did not contribute to the slum area may be included therein as part of the redevelopment area, that property owners may be given the right to repurchase their properties from the redevelopment authority in furtherance of the plan. The court did not determine that a municipal body was empowered without limit to declare an area blighted and, where the statute provided a hearing, to deny the property owner a fair and open hearing with the confrontation of the evidence to be considered by the body.

In the instant case the New Jersey statute directed that a public hearing be held and that the determination be made only on substantial evidence. The New Jersey statute

further granted to a property owner who had objected the right of judicial review of the determination. None of these questions are passed upon in *Berman* v. *Parker*. The further unusual question of the right of a municipality to take property by a declaration of blight and the permission not to proceed with the plan is not present. Thus confiscation of property without due compensation was entirely absent. It is submitted that the questions in the instant case were not decided in *Berman* v. *Parker*.

CONCLUSION

For the reasons and in the light of the authorities hereinabove cited, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THEODORE D. PARSONS,
WILLIAM R. BLAIR,
Counsel for Petitioners.

Appendix A

Opinion of the Supreme Court of New Jersey (No. A-123, September Term, 1957)

HARRY J. WILSON and LUCY WILSON, *et al.* (except Plaintiff, JESSIE A. HOWLAND AND SONS, INC.),

Plaintiffs-Appellants,

vs.

CITY OF LONG BRANCH, a municipal corporation,

Defendant-Respondent.

Argued April 22, 1958. Decided

On appeal from Final Judgment of Dismissal of the Superior Court, Law Division.

Mr. William R. Blair, Jr., argued the cause for plaintiffs-appellants.

(*Messrs. Parsons, Labrecque, Canzona & Combs*, attorneys; *Mr. Theodore D. Parsons* and *Mr. William R. Blair, Jr.*, of counsel.)

Mr. Clarkson S. Fisher, argued the cause for defendant-respondent.

(*Mr. Edward F. Juska*, of counsel.)

The opinion of the Court was delivered by FRANCIS, *J.*

Appendix A

On February 15, 1955, the Mayor and Board of Commissioners of the City of Long Branch adopted a resolution pursuant to *N.J.S.A.* 40:55-21.1 *et seq.*, requesting the Planning Board to make a preliminary investigation and to hold a public hearing for the purpose of determining whether an area of the City referred to therein was blighted. The area, which is located on the portion of the northwestern perimeter of Long Branch fronting on the Shrewsbury River and on a creek flowing into the river, was described as follows:

> "Beginning at the intersection of the Shrewsbury River and Branchport Creek; thence eastwardly along the Shrewsbury River to the extension of Manhasset Avenue; thence eastwardly along Manhasset Avenue extended and Manhasset Avenue to Patten Avenue; to Florence Avenue; thence southwardly along Florthence westwardly along Patten Avenue to Florence Avenue; thence southwardly along Florence Avenue to Joline Avenue; thence westwardly along Joline Avenue to the westerly bank of Troutman's Creek; thence northwardly along the westerly bank of Troutman's Creek to Atlantic Avenue; thence westwardly along Atlantic Avenue to Branchport Creek and along Branchport Creek to the point and place of beginning."

The Board undertook the preliminary investigation and conducted public hearings on May 3, 17 and 25, June 8, 22, July 13 and August 2, 1955. On September 8, 1955 it adopted a resolution declaring the area to be blighted within the meaning of the statute. After receiving a copy of the resolution and report and reviewing the entire matter, on October 4, 1955, the Board of Commissioners approved the determination of blight.

Appendix A

On October 31, 1955, 27 days thereafter, the plaintiffs instituted this action in lieu of prerogative writ in which they sought a judgment that the resolutions of both Boards are illegal and void because the Blighted Area Act is unconstitutional (for various reasons to be discussed) and because the proceedings before both bodies were not conducted in accordance with the requirements set forth in the Act. The trial court sustained the municipal action and we certified the matter for review on our own motion.

I.

The Issue of Constitutionality.

Section 1 of the Act, *N.J.S.A.* 40:55-21.1 defines a "blighted area" to mean an area "wherein there exists any of the conditions hereinafter enumerated:

> (a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air or space, as to be conducive to unwholesome living;
>
> (b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;
>
> (c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of

access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;

(d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;

(e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

The legislation provides that if, after certain proceedings have been taken, a portion of a municipality is found to be blighted within that definition, the governing body "may, but shall not be required to, acquire the real property within the area by purchase, or by eminent domain proceedings, and may proceed with the clearance, replanning, development or redevelopment of the area as a public purpose and for public use, or the said governing body may, by resolution, agree that a private corporation may undertake such clearance, replanning, development or redevelopment in accordance with statutory authority and subject to the provisions of paragraph 1, Section III, Article VIII, of the Constitution." *N.J.S.A.* 40:55-21.10.

Appendix A

Community redevelopment is a modern facet of municipal government. Soundly planned redevelopment can make the difference between continued stagnation and decline and a resurgence of healthy growth. It provides the means of removing the decadent effect of slums and blight on neighboring property values, of opening up new areas for residence and industry. In recent years, recognition has grown that governing bodies must either plan for the development or redevelopment of urban areas or permit them to become more congested, deteriorated, obsolescent, unhealthy, stagnant, inefficient and costly. As a result, at least 38 states now have remedial legislation similar to that of New Jersey. *Jacobs* and *Lecine*, *Redevelopment Making Misused and Disused Land Available and Usable*, 8 *Hastings Law Journal* 241 (1957). Even if there were no express constitutional sanction for redevelopment of the type described in our statute, ample authority to do so might be found in the well of police power. Manifestly, the purposes to be served are intimately related to the public health, welfare and safety and so are consonant with both Federal and State Constitutions. *Berman* v. *Parker*, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954); *Sorbino* v. *New Brunswick*, 43 N. J. Super. 554 (Law Div. 1957); *Redfern* v. *Jersey City*, 137 N. J. L. 356 (E. & A. 1948); *Ryan* v. *Housing Authority of Newark*, 125 N. J. L. 336 (Sup. Ct. 1940); *Romano* v. *Housing Authority, Newark*, 123 N. J. L. 428 (Sup. Ct. 1939), *aff'd* 124 N. J. L. 452 (E. & A. 1940); *Annotation*, 44 *A. L. R. 2d* 1414, 1420 (1955). As the former Supreme Court said in *Mansfield & Scott, Inc.* v. *West Orange*, 120 N. J. L. 145, 150 (Sup. Ct. 1938):

> "The state possesses the inherent authority—it antedates the constitution—to resort, in the building and

> expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights—either of person or of property—are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole. Planning confined to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress. * * * The police power of the state may be delegated to the state's municipal subdivisions created for the administration of local self government, to be exerted whenever necessary for the general good and welfare. It reaches to all the great public needs; * * *."

For an early forward looking expression in a related field, see *The Tide-water Company* v. *Coster*, 18 N. J. Eq. 518 (E. & A. 1866).

In the *Berman* case, *supra*, the United States Supreme Court dealt with the constitutionality of the 1945 Redevelopment Act of the District of Columbia—an act quite similar in scope to that now before us. Its validity was sustained with a broad expression of the vista of the police power:

> "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit

it. * * * Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. * * *." 348 *U. S.* at 32, 33; compare *Redevelopment Agency of City, etc.* v. *Hayes*, 122 Cal. App. 2d 777, 800-802, 266 P. 2d 105 (1954), *cert. den.* 348 U. S. 897, 75 S. Ct. 214, 99 L. Ed. 705 (1954).

Moreover, if there were any doubt at the state level of the compatibility of the statute in question with our organic law, it would be dispelled by the 1947 Constitution, which contains specific approval and authorization of redevelopment projects. *Article 8, 3, paragraph 1* declares:

"1. The clearance, replanning, development or redevelopment of blighted areas shall be a public pur-

pose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment, * * *."

Thus we come to the more specific charges of unconstitutionality.

(a)

It is urged that the Act violates *Article* 4, §7, *paragraph* 4, of the 1947 Constitution, which demands that every law shall embrace but one object and that shall be expressed in the title. The argument is that the title contains three objects, to wit: "An Act (1) defining 'blighted area', (2) authorizing municipalities to determine that areas are blighted areas, and (3) to undertake the clearance, replanning, development and redevelopment of such areas." *L.* 1949, *c.* 187. (Insertions ours.)

The standard prescribed for the title does not require that it contain a resume of the provisions of the act. Compliance exists when it expresses the general purpose and when all of the provisions of the legislation appear to be in furtherance of that purpose and appropriate to the end expressed. *General Public Loan Corp.* v. *Director, Div. of Taxation*, 13 N. J. 393, 403 (1953). In the present instance (1) the definition, (2) the authorization of municipalties to decide whether a particular area conforms to the definition, and (3) the authorization of municipalities to proceed to clear and redevelop the area are matters integrally related to the single objective, municipal improvement of blighted areas. *State* v. *Land Clearance for Redevelopment Auth.*, 364 Mo. 974, 270 S. W. 2d 44, 54 (1954). Nor does the fact that section 10, *N.J.S.A.* 40:55-21.10

permits the governing body, by resolution, to agree that a private corporation may undertake such clearance, etc., require a different conclusion. The section does not confer a power which is beyond the orbit of the title. It simply specifies one method by which the municipality may "undertake the * * * redevelopment". No authority is granted directly to a private corporation.

(b)

The novel argument is presented that prior to actual condemnation, the Act permits a taking of property without just compensation in violation of *Article* 1, ¶20, of the 1947 Constitution. Plaintiffs point out that *N.J.S.A.* 40:55-21.10 says that after a determination that an area is blighted, the municipality "may, *but shall not be required to* acquire the real property within the area by purchase, or by eminent domain proceedings * * *" and may redevelop it. And they urge that the "very determination of blight in itself constitutes a taking of property" because its market value is thereby lessened or destroyed, and with the threat of condemnation hanging over it, they cannot sell or improve it. In effect, they say that a statute is contrary to our basic law which permits a municipality to impair the value of property and restrict its use by a declaration of blight without requiring compensation for such loss. But this is not a taking in the constitutional sense. It is akin to the result which flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is *damnum absque injuria*. As Justice Heher said in *Mansfield & Swett, Inc.* v. *West Orange*, *supra*:

> "The principle is firmly established in our federal jurisprudence that injury to private property ensuing

from governmental action in a proper sphere, reasonably taken for the public good, and for no other purpose, is not necessarily classable as a 'taking' of such property within the intendment of the constitutional guaranties against the deprivation of property without due process of law, or the taking of private property for public use without compensation.

* * *

"A limitation of private property rights in land to the extent reasonably necessary to meet a public exigency is justifiable under this sovereign power. *Block* v. *Hirsh*, 256 U. S. 135; 41 S. Ct. 458; 65 L. Ed. 865. Ordinarily, a course of action may be deemed to be in the public interest when it fairly tends to promote the good of the community at large. *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504. And an ulterior public advantage may support a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Noble State Bank* v. *Haskell*, 219 U. S. 104; 31 S. Ct. 186; 55 L. Ed. 112."

And see: *Collins* v. *Board of Adjustment of Margate City*, 3 N. J. 200 (1949).

A similar issue was raised in *Bauman* v. *Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270 (1897). Congress enacted a law "To Provide a Permanent System of Highways in that Part of the District of Columbia Lying Outside of Cities." It directed the formulation of a general plan by the Commissioners of the District for the extension of such highways and for the making and recording of a map showing such plan. And the further provision was made that after the filing of the map, no non-conforming sub-

division of any land covered thereby should be admitted to record. An affected land owner charged that by reason of the language of the statute his property was taken without compensation when the map was filed. The United States Supreme Court rejected the claim, saying:

> "The recording of the map under § 2 does not constitute a taking of any land, nor in any way interfere with the owner's use and enjoyment thereof. * * * The object of the recording of the map is to give notice to all persons of the system of highways proposed to be established by subsequent proceedings of condemnation. It does not restrict in any way the use of improvement of lands by their owners before the commencement of proceedings for condemnation of lands for such highways, nor does it limit the damages to be awarded in such proceedings. The recording of the map, therefore, did not of itself entitle the owners of lands to any compensation or damages."

And in *Danforth* v. *United States*, 308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240 (1939), the same Court, speaking in a similar vein, said:

> "* * * Until taking, the condemnor may discontinue or abandon his effort. * * * A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." 308 U. S. at 284, 285.

To the same effect see *Kean* v. *Union County Park Commission*, 130 N. J. Eq. 591 (E. & A. 1941); *Zurn* v. *City of Chicago*, 389 Ill. 114, 59 N. E. 2d 18, 26 (1945).

Appendix A

(c)

The State and Federal Constitutions are said to be in conflict with the Act because it allegedly permits the taking of property by the municipality for private use, namely, for development by private capital and for the pecuniary profit of private individuals. The allegation stems from the provision of section 10, *N.J.S.A.* 40:55-21.10, to the effect that following the declaration of blight, the governing body may, by resolution, agree that a private corporation may undertake the redevelopment project. This permissive authorization is expressly sanctioned by our 1947 Constitution, *Article* 8, § 3, *paragraph* 1. As has been indicated, the ultimate taking of the land is clearly for a public use, i.e., elimination of the blight and redevelopment of the area for the welfare of the community as a whole. *Berman* v. *Parker*, *supra*; *Annotation*, *A.L.R.*, *supra*, pp. 1420-1426. The acquisition is not for the use of a private corporation (if one is engaged); rather, such corporation is used to accomplish the public purpose. *Cf. Redfern* v. *Jersey City*, *supra*. The private corporation, by its contract to redevelop, represents the means as distinguished from the end itself. And the possibility that some profit may eventuate therefrom does not render the means unlawful. *Papadinis* v. *City of Somerville*, 331 Mass. 627, 121 N.E. 2d 714, 717 (1954), and *cf. City of Trenton* v. *Lenzner*, 16 N. J. 465 (1954), *cert. den.* 348 U. S. 872, 75 S. Ct. 534, 99 L. Ed. 757 (1955). Again, the opinion in *Berman* v. *Parker*, *supra*, is pertinent:

> "Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Con-

gress and Congress alone to determine, once the public purpose has been established. * * * The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." At 33, 34.

Cf. State v. *Land Clearance For Redevelopment Auth.*, *supra*, at 52, 270 S. W. 2d 44, 54 (1954); *Schenck* v. *City of Pittsburgh*, 364 Pa. 31, 70 A. 2d 612 (1950); *Annotation*, 172 A. L. R. 966, 968 (1948).

(d)

It is alleged that the Act discriminates against private property owners and in favor of public utilities contrary to the Fourteenth Amendment of the Federal Constitution, and *Article* 1, ¶5 of the New Jersey Constitution. The complaint arises from the provisions of section 11, *N.J.S.A.* 40:55-21.11, which ordains that the governing body shall determine if retention of the utility property in its existing location will interfere with the consummation of the redevelopment plan. If so, an order shall be made requiring its removal and relocation, the expense thereof, including any for land or rights in land, to be a part of the cost of the municipal project. This is said to be discriminatory because no such recompense is established for the home owner or for the owner of a business who must also move his furniture and equipment following condemnation.

But the legislature may classify different types of property owners and treat them differently without offending the fundamental law. The requirement of equal protection

is satisfied if all persons within a class reasonably selected are treated alike. And a classification is reasonable if it rests upon some ground of difference having a real and substantial relation to the basic object of the particular enactment or on some relevant consideration of public policy. If there is a reasonable distinction, there is no oppressive discrimination. The legislature has a wide range of discretion in this area and distinctions will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them. *Robson* v. *Rodriquez*, 26 N. J. 517 (1958).

Utilities are necessary adjuncts of the public welfare. Their business operations and their property have been subject to special legislative treatment for many years. 43 *Am. Jur., Public Utilities & Services*, § 11. In the present context, uninterrupted service during and after the completion of the redevelopment project is vital. Where removal of the facilities is necessary, it is important that the relocation be as expeditious and as controversy-free as possible. That end is intimately related to the achievement of the overall public purpose and, along with the longtime recognition of the special nature of utilities, justifies the separate treatment prescribed.

(c)

Another challenge to constitutionality is that the Act contains no reasonable standards to guide a planning board or governing body in making a determination that an area is blighted. Of course, a delegation of unbridled discretion to these subordinate agencies, would constitute an abdication of the authority committed to the legislature by the Constitution. *Van Riper* v. *Traffic Tel. Workers' Fed.*,

N. J., 2 N. J. 335 (1949). The boundary lines of the grant of authority are not required to be marked out with mathematical precision. In *Ward v. Scott*, 11 N. J. 117, 123 (1952), this Court pointed out that "the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power."

The five subsections of section 1, *supra*, of the Act define "blighted area" with substantial exactitude and confine the municipal decision to those limits. The patent purpose is to deal with substantial areas as distinguished from individual properties, and to authorize a declaration of blight when the buildings therein fall within any of the descriptions specified. Without repeating those specifications, we have no hesitancy in finding them to be a sufficient channeling of the local authority.

More general standards were regarded as proper in *Berman v. Parker*, *supra*, 348 U. S. at 35. And see: *Sorbino v. New Brunswick*, *supra* at 568, 569; *Gobld Realty Co. v. City of Hartford*, 141 Conn. 135 104 A. 2d 365 (1954); *State v. Land Clearance For Redevelopment Auth.*, *supra* at 54-56; *Velishka v. City of Nashua*, 99 N. H. 161, 106 A. 2d 571 (1954); *Opinion to the Governor*, 76 R. I. 249, 69 A. 2d 331 (1949); *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 54 A. 2d 277 (1947).

Specifically, it is argued that the absence of any limitation upon the size of the area which may be designated as blighted and the possibility that sound structures or even a portion of a municipality containing a number of such structures may be included, points to unrestrained delegation of power. We cannot agree. The area to be classed as blighted is the portion of a municipality which in the judgment of the planning board or governing body, as the

case may be, reasonably falls within the definition laid down by the legislature. The fact that such an area includes some sound homes or buildings, or even that incorporated therein as an integral part and necessary to the accomplishment of the redevelopment plan, is a portion of the municipality containing structures which are not substandard, is not sufficient to provoke a judicial pronouncement that the legislature unreasonably surrendered its prerogatives and duties. And moreover, where as in this instance the guides for the subordinate agency action are adequate, the courts will not interfere with the boundary lines adopted in the absence of palpable abuse of discretion. *City of Newark* v. *N. J. Turnpike Authority*, 7 N. J. 377, 385 (1951), *appeal dismissed* 342 U. S. 874, 72 S. Ct. 168, 96 L. Ed. 657 (1951).

Reverting to *Berman* v. *Parker*, *supra*, we find that substantially the same issue was presented and adjudicated. Justice Douglas said:

> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a

whole. It was not enough they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. . . . Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

. . . .

Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not,

by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

"It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

To like effect are: *Sorbino* v. *New Brunswick*, *supra* at 574; *Kaskel* v. *Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 650, 662 (1953), *cert. den.* 347 U. S. 934, 74 S. Ct. 629, 98 L. Ed. 1085 (1954); *State* v. *Land Clearance For Redevelopment Auth.*, *supra*, 270 S. W. 2d at 53; *Annotation*, 44 A. L. R. 2d *supra* at 1439. Denial of the right of the municipality to draw within a blighted area certain houses or buildings which are in good condition, would be in some instances to defeat the overall legislative purpose, namely, the redevelopment of blighted *areas*.

(f)

Section 9 requires the institution of an action in lieu of prerogative writ to review a determination of blight within 30 days after final action by the governing body. The pertinent Supreme Court Rule, *R.R.* 4:88-15, fixes 45 days as the period of limitation. This apparent conflict, according to plaintiffs, renders the entire statute invalid. See Constitution, *Article* 6, 5, *paragraph* 4.

The complaint was filed within 27 days after the adoption of the confirmatory resolution of the governing body. Thus it was within time by both standards and it is not necessary to consider the effect of an actual conflict be-

tween them. In any event such a conflict would not invalidate the entire law. Obviously, the provision for review is separable; if it did not exist, a remedy in the courts could be had under *R.R.* 4:88. Consequently, the plaintiffs' position is not sustainable.

(g)

Finally, plaintiffs urge that because *Article 8, §3, paragraph 1* of the Constitution refers to "blighted" areas without defining the word, the authority to do so resides in the judicial and not the legislative branch of the government. This is entirely specious. The article declares that redevelopment of "blighted" areas shall be a public purpose and authorizes the legislature to empower municipal governments to undertake such redevelopment. Manifestly, the grant of power contemplated development and implementation by the legislature. Definition of blight was the ordinary and expected incident of the exercise of that power and no reasonable argument can be made that the connotation ascribed to it overreaches the public purpose sought to be promoted by the Constitution.

II.

Procedural Aspects of The Appeal.

(a)

As has been indicated, the preliminary investigation of the problem of whether the area in question is blighted was referred to the Planning Board by resolution of the governing body. Appellants claim that authority to comply with the request could not be conferred on the Board in that manner and consequently the entire proceeding before it was ultra vires.

The contention is predicated upon section 3 of the *Municipal Planning Act* of 1953, *N.J.S.A.* 40:55-1.3, which says:

> "The governing body may by ordinance grant any of the powers exercisable by a planning board to a planning board * * * created under section four of this act, *but no particular power may be exercised until expressly granted by ordinance* * * *." (Emphasis added.)

The conceded absence of express bestowal of authority by ordinance to conduct such an investigation at first shrouds the operation of the Board in doubt. However, the uncertainty disappears on reference to section 2 of the *Blighted Area Act*, *N.J.S.A.* 40:55-21.2, which directs that when the governing body passes a resolution for such a preliminary investigation,

> "If the municipality has a planning board created by ordinance, pursuant to the provisions of article one of chapter fifty-five of Title 40 of the Revised Statutes, the said resolution *shall* provide that the matter of such preliminary investigation shall be referred to the said planning board, * * *." (Emphasis added.)

The Long Branch Planning Board was established on July 6, 1954, under the provisions of the statute cited.

These two statutes must be treated as in *Pari materia*. Thus it was not necessary that the power to engage in the preliminary investigation be conferred specifically by ordinance. Such jurisdiction flowed directly and by operation of law to it from section 2 of the *Blighted Area Act* and existed independently of the ordinance which gave it birth. The point is without substance.

Appendix A

(b)

The Hearing before the Planning Board.

Section 4 of the Act, *N.J.S.A.* 40:55-21.4, directs the planning board to "cause a hearing to be held" at a fixed time and place to hear "persons interested in, or who would be affected by, a determination that the area is a blight area," * * * and who favor or are against such a determination." Public notice of the hearing is required to be published in a newspaper of general circulation in the municipality and a copy thereof must be mailed to the last owner of each parcel of property in the area according to the assessment records. The notice must contain the general boundaries of the area to be investigated, and must state that a map showing such boundaries and the location of the various parcels of property included therein has been prepared and can be inspected at the office of the municipal clerk.

The objection is advanced that the public notice employed in this instance contained some additional material not required by the statute and that the proof does not show the preparation and filing of the map mentioned. But the surplus information did not destroy the efficacy of the otherwise satisfactory notice. And the record amply demonstrates the presence of the map in the clerk's office prior to the time of the giving of the notice.

The nature of the hearing is specifically prescribed. The Board is required to

> "hear all persons interested in the investigation and shall consider any, and all, *written objections* that may be filed and any evidence which may be adduced in support of the objections, or any opposition to a deter-

mination that the area is a blighted area." *N.J.S.A.* 40:55-21.6. (Emphasis added.)

Plaintiffs assert that this section confers on them the right to a judicial hearing, that is, one where the proof is formally introduced subject to trial type examination and cross examination. And they claim that it was prejudicially erroneous for the Board to receive reports, maps and documents *ex parte*, and to make their own inspections of the area without specifically stating at open hearing and for the record what their observations disclosed. Further, they urge that it was improper to announce at the hearings that the Board had no subpoena power, that persons subpoenaed by plaintiffs did not have to testify unless they wished to do so, and that persons who did make statements did not have to submit to cross examination. And they insist finally that it was error to refuse to require the planning consultant who had prepared the principal report in the case to return for further cross examination by counsel for certain of the property owners where the hearing adjourned at the end of the particular session before the examination to which he had submitted had been completed.

It will be observed that the function of a planning board is to make a preliminary investigation, to determine if the area studied is blighted, and to report to the governing body. Final decision, both as to the condition of blight and as to whether the property in the area should be taken, rests with the latter body. No authority is given to the board to subpoena or to swear witnesses. They are directed to consider any and all written objections that may be filed. There is no legislative requirement that such persons must appear at the hearing or submit to cross examination. Hearsay statements which need not be under oath

and which are not required to contain information of their own knowledge, must be "consider[ed]". Any conceivable document, map, article or photograph might be incorporated therein.

In this context a distinction must be recognized between a legislative investigation and hearing and a judicial hearing. No adjudication of property rights is called for here nor is there any taking of property involved. There is simply preliminary investigation and report by a subordinate agency of government. These are typical of the legislative process.

The situation is somewhat similar, although not even as proximate in terms of due process requirements, to that presented when a public body undertakes to exercise the right of eminent domain. In such cases, although the issue of whether the property acquisition is for public use is a judicial question, the necessity for the taking and the extent of the area to be taken are legislative matters for which not trial type hearing is required.

In *Egan* v. *Housing Authority of Newark*, *supra*, where it was claimed that the decision to take certain property in condemnation proceedings for public housing purposes without hearing was violative of due process, the court said:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." 125 *N. J. L.* at 341.

Such questions are purely political and are not the subject of judicial inquiry. *Ringe Co. v. Los Angeles County*, 262 U. S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Dayton Coal & I. Co. v. Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 36 S. Ct. 137, 60 L. Ed. 375 (1915); *City of Trenton v. Lenzner*, *supra* at 473; *Abbotts Dairies v. Armstrong*, 14 N. J. 319, 332 (1954); *State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 523 (E. & A. 1935); *Zurn v. City of Chicago*, *supra*.

It seems plain that so far as the investigation of the matter of blight is concerned, the demands of due process did not call for a hearing at all. *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 66 N. W. 2d 362, 380 (1954); *Robinette v. Chicago Land Clearance Commission*, 115 Fed. Supp. 669, 672 (D. C. Ill. 1951). That determination might constitutionally have been left for *ex parte* action by the governing body or the planning board. Of course, the legislature in its discretion may, as was done here, lay down a mandate for a particular type of hearing. In this event, the procedure must be followed. But having in mind the nature of the public use involved and the fact that ordinarily the subject matter of the hearing is within the legislative domain, the language employed should be scrutinized carefully to determine if the law makers intended to yield the normal prerogative and function of their branch of the government.

The argument that a trial type hearing was intended is predicated largely upon the direction, in section 6, *supra*, that among other factors, the board "shall consider * * * *any evidence* which may be adduced in support of the objection, * * *." The idea is that the word "evidence" connotes proof conforming to the rules of evidence applicable to a judicial proceeding and submitted through the

avenue of direct and cross examination in the formal setting of a trial type hearing. But a doctrinaire formalism cannot be applied in the consideration of a problem like this. The legislative intent can only be gathered by a study of the entire enactment. The significance of the word "evidence" must then be drawn from its position and association in the framework fashioned by the makers.

As has been shown above, investigation or study of the desirability of acquiring private property for public use, as well as the decision to take, are preliminary matters which have always been regarded as legislative in character and not subject to the hearing requirements of due process. If this were not so, government could not function effectively. We must assume that the legislature, in adopting the *Blighted Area Act*, knew the state of the law and the difference between a legislative and a judicial hearing. No sound argument can be made that, when the legislature in writing the section directed the planning board to consider "any, and all, written objections that may be filed", it intended to limit the proof to facts admissible under the rules of evidence. The very words "any, and all," clearly point away from such a conclusion. The mandate to consider such objections is followed immediately by the crucial language "and [shall consider] any evidence which may be adduced * * *." In context, it would be inconsistent and illogical to say that this clause contemplates a judicial hearing. The embracive word "any" before "evidence" manifests a design to permit the introduction of any factual data or argument which an objector feels bears upon his position and the question to be reported upon by the board. The purpose is to give objecting property owners unlimited and unhampered scope in the presentation of material which they deem to be in support of their oppsition. The language fairly

breathes such an objective. Note that the board is ordered to consider any and all written "*objections*" and "any evidence which may be adduced *in support of the objections.*"

The imposition of a duty on a legislative agency to receive and consider evidence in connection with a hearing provided for in a statute, does not per se signify that the hearing is to be of the trial type. For example, in *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933), a source case in this field of the law, such was the holding. In that case it appeared that the Tariff Act of 1922 authorized the President to increase or decrease the rates of duty specified in the Act if he found upon investigation that such action was necessary to equalize the difference in the cost of production in the United States and elsewhere. After prescribing certain factors to be considered, Congress provided also that no proclamation should be issued until an investigation to assist the President had been made by the United States Tariff Commission, which was authorized to adopt such reasonable procedure, rules and regulations as it deemed necessary. The Act contained a mandate also that the "commission shall give reasonable public notice of its hearings, and shall give reasonable opportunity to parties interested to be present, *to produce evidence*, and to be heard." (Emphasis added.)

The Tariff Commission gave public notice that it would conduct an investigation as to the differences in cost of producing sodium nitrate in this country and elsewhere, and that it would hold a public hearing thereon on the date fixed in the notice. The investigation was made and considerable confidential data obtained from the principal domestic producers as to their production costs. At the

public hearing, Norwegian Nitrogen Products Co., a corporation of Norway, demanded that all such data be submitted to it for study, that the investigators working for the Commission be required to produce them or be cross examined about them. The Commission refused but said that as to all the subjects of inquiry Norwegian would be permitted to offer any evidence it was able to present, and to be heard in oral and written argument thereon. Norwegian then declined to offer any testimony. Subsequently, a report was made to the President and as the result he ordered an increase in the rate. Thereafter, the validity of the increases was attacked on an allegation that the type of hearing called for by the statute was not granted. The Court held to the contrary, Justice Cardozo saying:

> "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. • • • The inference is, therefore, a strong one that the kind of hearing assured by the statute to *those affected by the change* is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once a mere practice has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that has shaped the course of legislation." 288 U. S. at 305.
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> Nothing in the statute suggests a belief of the lawmakers that every producer or importer was to be

viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. 'There must be a limit to individual argument in such matters if government is to go on.' Holmes, J., in *Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U. S. 441, 445, 60 L. Ed. 372, 375, 36 S. Ct. 141, 288 U. S. at 308.

* * *

"The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. * * * Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights." 308 U. S. at 318.

The statute of New Jersey, *N.J.S.A.* 4:12A-1 *et seq.* authorizing the Director of the Milk Control Board to fix prices of milk, was the subject of the litigation in *Abbotts Dairies v. Armstrong, supra.* Section 23 thereof ordained that before fixing prices, the Director should give public notice, conduct a public hearing, and issue "findings of fact and an order based upon the evidence adduced at said hearing." These are more stringent hearing regulations

than those now before the Court. But the hearing was recognized as legislative in character and no intimation appears in the opinion that the right of cross examination was conferred thereby on interested persons. 14 *N. J.* at 332.

The authorities to which reference has been made, as well as the specific wording of the statute, lead irresistibly to the conclusion that the hearing provided for was legislative in character and that cross examination of persons who appeared and made statements was not a matter of right. They are convincing also as to the absence of any right or duty on the part of the Planning Board to issue subpoenaes for witnesses or to require those desiring to be heard to be sworn.

The hearings held by the Board were marked by repeated announcements from the Chairman that anyone who wished to speak for or against the determination of blight would be heard. 25 persons were heard, most of them being property owners of the area. A large number of photographs showing existing conditions of vacant land and residences and other types of structures were introduced. One was a large aerial photograph of the area; many of them were produced by the objecting property owners showing their own homes. A series of maps were produced showing (a) land use in the entire City, (b) topography of the project area, (c) housing conditions, (d) undeveloped land, (e) land not properly utilized, (f) extent of blighting factors, and (g) tax delinquent land, in the project area. Presented also was the elaborate report of the planning consultant who made a study of the conditions in the area with respect to blight. A number of letters of objectors were likewise introduced. It is not suggested that the appellants were not given ample opportunity to

examine these various documents or to introduce evidence in refutation. However, they furnished no expert witness or report from such person in opposition to the findings of the expert engaged by the Housing Authority of the City.

The latter expert, whose detailed report was marked in evidence, made a statement generally outlining its scope. Then he submitted to cross examination by appellants' counsel for about four and one-half hours on two separate occasions. The rigorous questioning covers 113 pages of the stenographic transcript. On the third hearing date, he refused to appear further. Having in mind the legislative character of the proceedings, such failure did not invalidate the final action of the Board.

III.

The Attack in the Law Division on the Determination of Blight By the Planning Board and the City Commission.

Section 6 of the Act which outlines the nature of the hearing before the Board says:

> "A determination that the area * * * is a blighted area, if supported by substantial evidence, shall be binding and conclusive upon all persons affected by the determination." *N.J.S.A.* 40:55-21:6.

In the Law Division, plaintiffs charged that the declaration of blight was not supported by substantial evidence. At the trial they appeared to be seeking a trial de novo of the issue of blight and offered evidence pursuant to that objective. However, the trial court refused to treat the action as an original one and so ruled. The suit then proceeded on the thesis that the substantial evidence test was to be applied to the municipal determination.

Ordinarily, judicial review in a case of this kind would not proceed beyond the ascertainment of whether the local governmental action was arbitrary or capricious, *Schenck v. City of Pittsburgh, supra; State v. Land Clearance For Redevelopment Auth., supra; David Jeffrey Co. v. City of Milwaukee, supra at* 66 N. W. 2d 374; or corrupt, irrational or baseless, *Kaskel v. Impellitteri, supra.* It is not necessary to explore the possible nuance of whether, if the evidence shows that the municipal determination was not arbitrary or capricious, it follows, as of course, that the evidence in support is substantial. In any event, we agree with the trial court that the statutory criterion was satisfied.

In the Law Division the testimony and the exhibits presented to the Planning Board and by it to the City Commission were admitted in evidence by consent. That evidence, coupled with additional proofs which were introduced largely upon the claims that certain members of the Board and City Commission were disqualified to act, that the matter had been prejudged by both bodies prior to the public hearings and that the various resolutions were invalid, constituted the record upon which the issue was resolved. In addition, the trial court made a personal inspection of the area.

From that record the following factual outline is drawn:

The gross area involved is 100.8 acres. As of May 1955, 7.6 acres were in public rights of way, leaving a total net land area of 93.2 acres. Of this property, 53.1 acres were used for residential purposes and 9.7 acres were devoted to commercial use. The remaining 28.4 acres were vacant and unimproved. In September 1954 the City had liens upon or title to 34.2 acres by reason of tax delinquency.

Proof was submitted to show the project area to be blighted within the meaning of 3 of the 5 criteria set forth

in *N.J.S.A.* 40:55-21.1. As has been said, this statute contains 5 definitive subdivisions; if the prevalent conditions of a municipal area conform to any one of the enumerated standards, that area is a proper subject for a determination of blight.

Inspection revealed that 41 of the 71 buildings used as dwellings in the area were so deficient in proper construction or maintenance as to render the area prone to a declaration of blight. A residence was rated as substandard "when it showed serious conditions of disrepair, either of the outside walls, roof, foundation, inside walls, floors or ceilings; when it was of inadequate original construction that did not come up to standards for legal permanent construction; or when it lacked such major facilities as running hot water, a private bath or a private interior flush toilet for each dwelling unit." Specifically, it was determined that many of the structures were in need of extensive repairs, and that over 20 of them were "severely deteriorated" because of obsolescence (one was built in 1866) or poor construction. Included in the latter category was a group of 23 temporary residences which had been erected pursuant to a veterans' project on land owned by the City, and whose rapid deterioration had previously impelled the Housing Authority to desire their removal. (They were removed after the determination of blight and before the trial in the Law Division.)

In addition, 4 of the residential properties contained dwellings which were found to be inadequate or lacking in heating and plumbing facilities, and several houses were adjudged to be fit only for summer habitation. Other homes were determined to be substandard in original construction, and some were seen as being unsuitable or dangerous for residential use.

Appendix A

The 41 dwellings found deficient comprised 58% of all of the residential structures in the project area; thus the City Housing Authority and the expert concluded that a "generality" of the residences in the area conformed to the conditions enunciated by subsection (*a*) of the statute.

Another portion of the project area was said to be blighted according to *N.J.S.A.* 40:55-21.1(*c*). It was found that 5 parcels of unimproved property totaling 28.4 acres, or 21.8% of the gross acreage of the project area, came within this category. This property had not been improved in the past 10 years and, in the judgment of the Housing Authority, it was likely to remain in that state. Future development by private capital was not feasible because of several factors. 3 of the parcels were low and swampy in character, and development was contingent upon extensive filling operations. Because of a diversity of ownership of these properties, it was deemed unlikely that the owners would cooperate to effect rehabilitation projects. And it was said of one of them that development "scarcely seems possible." Another parcel, which was owned by the city by virtue of a tax foreclosure, was "fairly isolated from good development." And the fifth property was so poorly subdivided as to make development impractical.

Finally, blight was found in the area under subsection (*c*) of the statute. It was determined that 42 acres, or 41.7% of the total project area, conformed to that definition. This land included the 28.4 acres of unimproved property, together with 5 other properties. Of the 10 parcels, 6 were wholly or partly in tax delinquency, and the city had taken foreclosure title to 2 entire parcels and to part of another. 7 of the properties were vacant, another was only partially developed, and the remaining 2 were not being used according to their highest potential.

Thus the expert and the Housing Authority asserted that in all, 69.7 acres of the project area were blighted under one or more of the statutory definitions. The blighted territory comprised 74.8% of the net project area of 93.2 acres. In this connection, one of the property owners, who testified before the Planning Board as an objector and consented to answer some questions on cross examination, indicated that he was "afraid of this plan because [he did not] feel that the people who are going to be displaced by it will receive sufficient recompense to put them back on the same status they are, in the same type location, without a cost economically to them more than they can afford." Then he was asked:

> "Q. • • • What do you think of the area as a whole? Right from Branchport down to the other end?
>
> "A. Right from one end to the other?
>
> "Q. Yes.
>
> "A. The unfortunate part of it is, gentlemen, you asked me sort of a loaded question. I might as well come out and tell the truth now. The area as a whole in its entirety is blighted, in my personal opinion. Of course, the Judge may not see eye to eye with me—much to my joy. However, I think you bit off a little more than you could chew when you included all the property to the west of the Baruch estate." (a small portion at the westerly end of the project area. Addition ours.)

Many of the pictures introduced portrayed dilapidated homes and other buildings, which were obviously beyond restoration. Some produced by individual property owners showed their homes. The great majority of these were advanced in years and of summer residence type construc-

tion; some obviously needed painting; others appeared to be in good condition. With few exceptions, the objectors spoke in terms of the condition of their own properties rather than of the overall state of the area. One such person referred to "an isolated" portion where his and several other properties "were kept up" and he saw no reason why that section had to be included in the general plan. Another witness, a member of the bar who had lived in the locality for many years, said he was shocked to see the condition of the waterfront area. He felt that it had "reached a very low ebb". And he said: "We feel that as far as Long Branch is concerned that the waterfront is the bright spot for the city, which could be the greatest asset your city could have. * * *."

It is obvious from the record that the members of the Planning Board were very familiar with the section involved and that they had made specific inspections in connection with this matter. One of them had lived in the neighborhood for 30 to 35 years.

At the request of counsel, the trial judge made a tour of the area. After doing so and studying the record made before the Planning Board, he came to the conclusion that "there was both abundant and substantial evidence to support the findings that the area in question is blighted within the meaning of the statute." Our own study has revealed no justifiable ground for interference with that result.

It is understandable that individual property owners, who believe their homes to be in good condition and fully adapted to purposes of residence, find it difficult to accept a determination of blight. Obviously, the prospect of dislocation adds to that difficulty. However, the process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms

of redevelopment of areas. Such improvements will inevitably envelope some property or properties which, standing alone, cannot be so described. When this occurs, the individual must bow to the public welfare and accept just compensation for his deprivation.

IV.

Plaintiffs allege that certain members of the Planning Board were disqualified to act because of personal or pecuniary interest. *N.J.S.A.* 40:55-1.4 is cited in support of the charge. It prohibits a member of a planning board from acting in any matter in which he has either directly or indirectly any personal or financial interest. It appears that the Chairman of the Board was the president, a director, and a stockholder of a bank holding some mortgages on property in the area; another member was a director and stockholder of the same bank; a third was Health Officer of the City and owned and resided on premises about 300 feet from the project area. In our judgment, the so-called interest of these persons is so remote and contingent as not to warrant disqualification. The cases of *Hochberg* v. *Borough of Freehold*, 40 N. J. Super. 276 (App. Div. 1956), *certif. den.* 22 N. J. 223 (1956); *Zell* v. *Borough of Roseland*, 42 N. J. Super. 75 (App. Div. 1956); and *Aldom* v. *Borough of Roseland*, 42 N. J. Super. 495 (App. Div. 1956), are not to the contrary.

The Mayor of the City, who voted for the blight resolution as a member of the governing body, was a director and stockholder of a bank and savings and loan association which held some mortgages in the area. This was not sufficient reason to bar him from performing his official duties. Other suggestions as to disqualification of the various members do not supply sufficient basis for such a ruling.

Appendix A

V.

Complaint is made that the City Solicitor improperly participated in the proceedings before the Planning Board, thereby invalidating its resolution. There is no doubt that *N.J.S.A.* 40:55-21.1 *et seq.* contemplates independent action and determination on the part of the Board and the City Commission. Each body had its own attorney and propriety demanded that his advice be confined within the sphere of his own agency. See *Dolan* v. *De Capua*, 16 N. J. 599 (1954).

It is plain from the record that the City Solicitor appeared at the hearings and advised the Planning Board as to procedure and rulings on evidence. This was done despite the presence of the Board's own attorney. The intrusion was improper, even though motivated by good faith. However, since no prejudice seems to have resulted to the plaintiffs, we do not find it fatal to the validity of the proceedings.

VI.

Several other grounds of appeal have been argued. All of them have been examined. They present no cause for reversal.

The judgment of the Law Division is affirmed.

Appendix B

Mandate in Affirmance of the Supreme Court of New Jersey

Appeal Docket No. 2584

HARRY J. WILSON and LUCY WILSON, et al. (except Plaintiff, JESSIE A. HOWLAND AND SONS, INC.),

Plaintiffs-Appellants,

vs.

CITY OF LONG BRANCH, a municipal corporation,

Defendant-Respondent.

This cause having been duly argued before this Court by Mr. William R. Blair, Jr., counsel for the appellants, and Mr. Clarkson S. Fisher, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the sixteenth day of June, 1958.

Filed Jun 16 1958

John H. Gildea
Clerk

JOHN H. GILDEA
Clerk of the Supreme Court

Appendix C

Excerpt from Complaint in Lieu of Prerogative Writ

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY
DOCKET NO. L 1580 55 PW

HARRY J. WILSON, et als.,
Plaintiffs,

vs.

CITY OF LONG BRANCH, et al.,
Defendant.

15. The Resolutions and actions of the Planning Board and the Board of Commissioners of the City of Long Branch are further illegal and of no effect because:

(a) R.S. 40:55-21.1 et seq. is unconstitutional and contrary to the provisions of Paragraph 4, Section 7, Article 4 of the State Constitution in that the title of the act embraces more than one object.

(b) Said act is unconstitutional in that it violates Section 1 Article 1 of the Constitution of the State of New Jersey and the Fifth and Fourteenth Amendments of the United States Constitution.

(c) Said act does not provide for proper notice or due process of law in the taking of private property and is

contrary to the Constitution of the United States and the Constitution of the State of New Jersey.

(d) Said act is unconstitutional in that it permits the taking of property without due compensation therefor in that there is no provision after an area has been termed a blighted area and the value of the property diminished at the expense of the property owners that the governing body shall pay for the diminution in value.

(e) The action of the City of Long Branch under the provisions of the statute of the State of New Jersey is not in accordance with the Federal Statutes.

(f) The statute of the State of New Jersey is unconstitutional in that it permits the taking of private property for other than State or municipal purposes, namely; for development by private capital and for the pecuniary profit of private persons.

(g) The act is unconstitutional in that it sets up no proper standard for determining that the property within the area is blighted.

(h) Said act is unconstitutional in that it purports to set up methods and provisions of appeal contrary to the rules established by the Supreme Court.

(i) Said act is unconstitutional in that it does not require the municipality to acquire and pay for the property.

(j) Said act is unconstitutional in that it gives private persons the right by eminent domain to take private prope-

erty contrary to the Constitutions of the State and of the United States for private use.

(k) The proceedings are illegal because the acts of the Commission of the City of Long Branch and of the Planning Board of the City of Long Branch are ultra vires.

(l) The proceedings are illegal and void, since the plaintiffs were not afforded an opportunity to examine officials and employees of the City of Long Branch.

(m) The proceedings were illegal and void, because the plaintiffs were not afforded an opportunity to examine those who prepared and submitted reports which were received in evidence.

(n) The proceedings were illegal in that the statutory requirements for noticing intersted parties in the conduct of the proceedings were violated.

(o) The actions of the Planning Board and of the Commission were improper and illegal in that members of both bodies had either direct or indirect interests in the area in question.

(p) The proceedings were illegal and void, because the Resolution was not enacted in accordance with the Statute.

(q) The act is unconstitutional; because it does not afford to the plaintiffs an opportunity to offer evidence or to examine witnesses produced before the Planning Board.

Appendix D

Excerpt from Pretrial Order

Pretried by Judge Ewart
on Sept. 10, 1956.

6 The complts in both the Wilson and Mead suits are amended by adding to each such complts the following additional allegations:

"The aforesaid determination of the planning board and the aforesaid resolution of the City of Long Branch approving the same are illegal, arbitrary, unreasonable, unconstitutional and void:

(a) Because the determination of the planning board was not supported by substantial evidence within the meaning of NJSA 40:55-21.6; and

(b) Because such statements and materials as were introduced at the hearing before planning board were insufficient to support a determination that the area in question was in fact a 'blighted area' within the meaning of NJSA 40:55-21.1 et seq; and

(c) Because the planning board improperly and illegally considered matters de hors the record in arriving at their conclusion; and

(d) Because those members of the planning board who did vote upon the determination improperly consulted and discussed the matter with members of the planning board not qualified to vote".

Defts, including the State of NJ, will be understood as denying the material allegations of the foregoing amendment to complts, without the formality of filing an answer.

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7 In addition to the mixed factual and legal contentions raised in paragraph 2 above, pltfs further contend as follows:

That the cited statute is unconstitutional in that its title embraces more than one object and embraces objects not set forth in the title;

That the statute is violative of both Article 1 Sec 1 of the NJ Constitution and of the 5th and 14th Amendments of the Federal Constitution, in that it fails to provide for due process in the taking of private property;

That it permits the taking of private property without just compensation;

That it permits the taking of private property for other than State or municipal use, namely, for development by private capital and for the pecuniary profit of private persons;

Further, that the statute sets up no proper standards for a determination of whether or not a particular area is blighted;

Further, that the statute sets up certain methods and provisions relating to an appeal that are not in conformity with and go beyond the rules established by the Supreme Court and, that being a procedural matter, is beyond the power of the Legislature under the Constitution;

Further, pltfs contend that the statute does not require the municipality to acquire and pay for property in a blighted area, even after having determined that the area is blighted, and that a determination of blight amounts to a taking and pltfs are therefore deprived of their property without due process;

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"Further, pltfs contend that the statute does not provide for due process in the constitutional sense, in that it does not afford objectors a proper opportunity, compulsory process, to offer evidence, produce witnesses, and to cross-examine witnesses at the hearings before the Planning Board;

Further, pltfs contend that the statute does not make proper provision for notice to property owners who may have their property taken away, and that not all property owners within the subject area received even the notice provided for by the statute prior to the hearings;

Also plaintiffs contend that there was a failure to comply with the statutory provision requiring notice of the action to be taken to be given to those affected by serving upon them a copy of the resolutions adopted."

• • • •

Appendix E

Pertinent Statutes (R.S. 40:55-)

40:55-21.1 "Blighted Area" Defined

As used in this act, the term "blighted area" shall mean an area in any municipality wherein there exists any of the conditions herein: "or enumerated:

(a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living;

(b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;

(c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;

(d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;

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(e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

40:55-21.2 Preliminary Investigation

The governing body of any municipality, by resolution, may provide for a preliminary investigation of any area in the municipality to determine whether such area is, or is not, a blighted area, as defined in this act. If the municipality has a planning board created by ordinance, pursuant to the provisions of article one of chapter fifty-five of Title 40 of the Revised Statutes, the said resolution shall provide that the matter of such preliminary investigation shall be referred to the said planning board, or if there is no such planning board in the municipality, then the said resolution shall provide that the preliminary investigation shall be conducted by the governing body of the municipality.

40:55-21.3 Map of Area to be Investigated; Statement

Whenever such a resolution is adopted, the governing body, or the planning board, as the case may be, shall first cause to be prepared a map showing the boundaries of the area to be investigated and the location of the various parcels of property included therein. There shall be appended to the said map a statement setting forth the basis for the investigation.

40:55-21.4 Hearing

The governing body or the planning board shall thereupon cause a hearing to be held at an appointed time and

place for the purpose of hearing persons interested in, or who would be affected by, a determination that the area is a blighted area, as defined in this act, and who favor or who are against such a determination.

40:55-21.5 Notice of Hearing

A notice of any such hearing shall be given setting forth the general boundaries of the area to be investigated and stating that a map has been prepared and can be inspected at the office of the clerk of the municipality. A copy of such notice shall be published in a newspaper of general circulation in the municipality once each week for two consecutive weeks, and the last publication shall be not less than ten days prior to the date set for the hearing. A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to any and all persons at his, or their, last known address, if any, whose names are noted on said assessment records as claimants of an interest in any such parcel. The assessor of the municipality shall make such a notation upon the said records when requested so to do by any person claiming to have an interest in any parcel of property in the municipality. The notice shall be published and mailed by the clerk of the municipality, or by such clerk or official, as the governing body or planning board shall designate. Failure to mail any such notice shall not invalidate the investigation nor determination thereon.

40:55-21.6 Objections; Determination; Service of Copy of Resolution

At the hearing, which may be adjourned from time to time, the governing body, or planning board, as the case

may be, shall hear all persons interested in the investigation and shall consider any, and all, written objections that may be filed and any evidence which may be adduced in support of the objections, or any opposition to a determination that the area is a blighted area. After the hearing, the governing body, or planning board, shall, by resolution, determine that the area or any part thereof is, or is not, a blighted area, as defined in this act. A determination that the area or any part thereof is a blighted area, if supported by substantial evidence, shall be binding and conclusive upon all persons affected by the determination. If the determination is that the area or any part thereof is a blighted area, the governing body or planning board, within ten days after such determination, shall cause to be served a copy of the resolution upon each person who filed a written objection prior to the hearing: *provided*, the address of the objector was stated in, or upon, the written objection.

Such service may be made (a) by delivering a copy of the resolution personally to the objector, (b) by mailing such copy addressed to the objector according to his said stated address, or (c) by leaving such copy at said stated address for the objector with a person of suitable age and discretion.

40:55-21.7 Approval or Modification of Determination

Where the determination is made by a planning board, it shall be subject to approval, disapproval or modification by the governing body of the municipality. The determination shall be submitted by the planning board to the governing body of the municipality in the form of a report and final action thereon shall be taken by the said governing body within thirty days after the submission of said report.

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40:55-21.8 Review of Determination, Time For

Where written objections shall have been filed and the determination is that an area is a blighted area, no further proceedings shall be taken by the governing body of the municipality upon such determination until thirty days shall have elapsed after such determination. If within said thirty-day period an action to review the determination is commenced in the Superior Court, no further proceedings shall be taken by the said governing body upon such determination during the pendency of such action.

40:55-21.9 Persons Entitled to Review; Time For Review Action; Incidental Orders

Any person who shall have filed such a written objection with the governing body, or planning board, as the case may be, may have a determination that an area is a blighted area reviewed by the Superior Court of New Jersey by procedure in lieu of prerogative writs. An action for any such review shall be commenced within thirty days after the determination by the governing body of the municipality, either in the first instance, or by final action upon a report by a planning board. In any such action, the said court may make any incidental order that shall be deemed by the court to be proper.

40:55-21.10 Acquisition of Property Within Blighted Areas

If the determination is that an area is a blighted area, the governing body of the municipality may, but shall not be required to, acquire the real property within the area by purchase, or by eminent domain proceedings, and may proceed with the clearance, replanning, development or redevelopment of the area as a public purpose and for

public use, or the said governing body may, by resolution, agree that a private corporation may undertake such clearance, replanning, development or redevelopment in accordance with statutory authority and subject to the provisions of paragraph 1, Section III, Article VIII, of the Constitution; *provided, however*, that the power of eminent domain hereinbefore conferred upon the governing body of the municipality shall not be exercised to acquire, for any of the purposes of this act, any property or interests in property owned or used by any public utility (as defined in section 48:2-13 of the Revised Statutes) in furnishing any commodity or service which by law it is authorized to furnish.

40:55-21:11 Removal, Reconstruction or Relocation of Property of Public Utility or Common Carrier Interfering With Plan

If any plan for the clearance, replanning, development or redevelopment (hereinafter called the "plan") of a blighted area is undertaken as provided for in section ten of this act, and such plan shall provide for the closing or vacating of any street, avenue, highway, road, lane, alley or other public place or way (hereinafter called "street") in, on, along or under which is located any property owned or used by any public utility (as defined in section 48:2-13 of the Revised Statutes) or by any common carrier, in furnishing any commodity or service which by law it is authorized to furnish, the governing body of the municipality shall, by resolution, determine whether or not the retention of such property in its then existing location will interfere with the consummation of the plan.

If the governing body of the municipality shall so determine that the retention of such property in such location will interfere with the consummation of such plan,

the governing body shall make an order requiring the public utility or common carrier owning or using such property to remove, reconstruct, alter or relocate such property, and upon the receipt of such order such public utility or common carrier shall remove, reconstruct, alter or relocate such property in accordance with such order, and the cost and expense of such removal, reconstruction, alteration or relocation, including the cost of installing or replacing such property in a new location or new locations, and the cost of any lands or any rights or interest in lands, and any other rights acquired to accomplish such removal, reconstruction, alteration or relocation shall be paid by the municipality or by the private corporation, as the case may be, as a part of the cost of the plan. In case of the relocation of any such property, the public utility or common carrier owning or using the same, its successors and assigns, may maintain and operate such property, with the necessary appurtenances, in the new location or new locations, for as long a period and upon the same terms and conditions as it had the right to maintain and operate such property in its former location.

If the governing body of the municipality shall determine that the retention of such property in such location will not interfere with the consummation of such plan, the governing body shall cause the proper officers of such municipality to execute, acknowledge or prove, and deliver to such public utility or common carrier an instrument in writing, granting to such public utility or common carrier the right, privilege and authority to enter upon the lands which comprised such street prior to its closing or vacation, for the purpose of maintaining, repairing, renewing, replacing, reconstruction, altering or removing any such property.

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40:55-21.12 Construction of Act

Nothing contained in this act shall be deemed to require the governing body of any municipality to proceed to an investigation and determination that an area is a blighted area, nor to limit, except as herein provided, the power of any municipality, or of any public or private corporation, or person from exercising any right conferred upon it, or him, by any law of this State with respect to the acquisition of private property for the clearance, replanning, developing or redevelopment of blighted areas at the time and in the manner provided by law.

40:55-21.13 Partial Invalidity

If any provision of this act is held to be invalid, the remainder shall not be affected thereby and each provision of this act shall be deemed to be separable.

40:55-21.14 Effective Date

This act shall take effect July first, one thousand nine hundred and forty-nine.

Appendix F

Pertinent Statutes (R.S. 55:14A-)

55:14A-31 Legislative Declaration Regarding Blighted Areas

It is hereby found and declared (a) that there exist in many communities within this State blighted areas (as defined herein or areas in the process of becoming blighted; (b) that such areas impair economic values and tax revenues; that such areas cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the State, that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; (c) that the clearance, replanning and preparation for rebuilding of these areas, and the prevention or the reduction of blight and its causes, are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of State concern; (d) that there are also certain areas where the condition of the title, the diverse ownership of the land to be assembled, the street or lot layouts, or other conditions prevent a proper development of the land, and that it is in the public interest that such areas, as well as blighted areas, be acquired by eminent domain and made available for sound and wholesome development in accordance with a redevelopment plan, and that the exercise of the power of eminent domain and the financing of the acquisition and preparation of land by a public agency for such redevelopment is likewise a public use and purpose; (e) that redevelopment activities will stimulate residential construction which is closely correlated with general economic activity;

and that such undertakings authorized by this act will aid the production of better housing and more desirable neighborhood and community development at lower costs and will make possible a more stable and larger volume of residential construction, which will assist materially in achieving and maintaining full employment; and (f) that it is in the public interest that advance preparation for such projects and activities be made now, and that the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

55:14A-32 "Blighted Area" Defined

The term "blighted area" is defined to be that portion of a municipality which by reason of, or because of, any of the conditions hereinafter enumerated is found and determined as provided by law to be a social or economic liability to such municipality:

(a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living;

(b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;

(c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such

municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.

(d) Areas (including slum areas), with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;

(e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

55:14A-33 Determination That Area Is Blighted Area

The determination that an area is a "blighted area," within the meaning of such term as defined herein, shall be made solely by the municipality, after investigation, notice and hearing, in accordance with the provisions of chapter one hundred eight-seven of the laws of one thousand nine hundred and forty-nine.

55:14A-34 Redevelopment Project

Any housing authority now or hereafter established pursuant to the Local Housing Authorities Law and any amendments thereto, may, when authorized by ordinance of the governing body of the municipality, which said governing body is hereby authorized to adopt, initiate and carry

out any work or undertaking (hereafter called a "redevelopment project"):

(1) to make surveys and prepare redevelopment plans; and acquire blighted areas, as herein defined;

(2) to acquire other real property for the purpose of removing, preventing or reducing blight, blighting factors, or the causes of blight;

(3) to acquire real property where the acquisition of the area by the authority is necessary to carry out a redevelopment plan;

(4) to clear any areas acquired and install, construct, or reconstruct streets, utilities, and site improvements essential to the preparation of sites for uses in accordance with the redevelopment plan;

(5) to sell or lease land so acquired for uses in accordance with the redevelopment plan; or

(6) to accomplish a combination of the foregoing to carry out a redevelopment plan.

55:14A-35 CARRYING OUT REDEVELOPMENT PROJECT; PREREQUISITES

The governing body of a municipality shall not authorize a housing authority to initiate or carry out any redevelopment project if it has created a redevelopment agency pursuant to law. A housing authority shall not acquire any real property for a redevelopment project unless the governing body of the municipality has first determined that the area in the municipality to which the project refers is blighted, which determination shall be made as provided by chapter one hundred eighty-seven of the laws of one thousand nine hundred and forty-nine; nor unless

the governing body of the municipality has determined that the redevelopment plan, hereinafter referred to, conforms to the duly approved master plan or part thereof, if any, of the municipality. Prior to the approval of any such redevelopment plan, the planning board, if any, of the municipality shall be given an opportunity to make recommendations to the governing body concerning such plan.

55:14A-36 Duties Which Municipality May Impose Upon Authority

The governing body of any municipality in or for which an authority has been authorized to proceed hereunder may: (a) order any such authority, or any officer or employee thereof to do such acts as may be necessary to comply with the provisions of any redevelopment plan approved by it, or to refrain from doing any acts in violation thereof; and (b) require any such authority to maintain and keep uniform systems of accounts and records for redevelopment projects and to file, at such time and in such manner as it may prescribe, reports and answers to specific questions concerning such projects.

55:14A-37 Estimate Of Income And Expenses By Housing Authority; Reports Of Transactions

A housing authority shall, in connection with any redevelopment project undertaken in accordance with the provisions hereof:

(a) Annually submit to the municipality an estimate of all income and expenses for such redevelopment project, which shall include all its indebtedness including payments necessary to meet interest and principal payments on bonds issued pursuant to this act. Such estimate shall be

subject to such changes as the municipality may prescribe. No such estimate shall be effective unless it is approved by the governing body of the municipality; no expenditures or disbursements for any redevelopment project shall be made by the authority except in accordance with an estimate, or any amendments or modifications thereof, so approved by the governing body of the municipality.

(b) File with the municipality a detailed report of all its transactions, including a statement of all revenues and expenditures, without exception, at monthly, quarterly, or annual intervals as the municipality may prescribe.

55:14A-38 Rights, Powers, Privileges And Immunities Of Housing Authority

In undertaking such redevelopment projects a housing authority shall have all the rights, powers, privileges and immunities that such authority has under the Local Housing Authorities Law and any other provision of law relating to slum clearance and housing projects for persons of low income (including, without limiting the generality of the foregoing, the power to make and execute contracts, to issue bonds and other obligations and give security therefor, to acquire real property by eminent domain or purchase, and to do any and all things necessary to carry out projects) in the same manner as though all the provisions of law applicable to slum clearance and housing projects were applicable to redevelopment projects undertaken under this act; *provided, however*, that the power to acquire real property by eminent domain conferred upon any housing authority shall not be exercised to acquire any property or interest in property owned or used by any public utility (as defined in section 48:2-13 of the Revised Statutes) in furnishing any commodity or service which

by law it is authorized to furnish; and *provided further*, that nothing contained in section 55:14A-8 added to the Revised Statutes by chapter nineteen of the laws of one thousand nine hundred and thirty-eight shall be construed as limiting the power of an authority, in the event of a default by a purchaser or lessee of land in a redevelopment plan, to acquire property and operate it free from the restrictions contained in said sections.

55:14A-39 Public Utilities; Cost of Removing, Reconstructing, Altering or Relocating Property of; Use of Property Relocated

If any housing authority shall undertake a redevelopment project, and as a part of the redevelopment project or in connection therewith any property owned or used by a public utility (as defined in section 48:2-13 of the Revised Statutes) in furnishing any commodity or service which it is authorized by law to furnish, shall be removed, reconstructed, altered or relocated, the cost and expense of the removal, reconstruction, alteration or relocation of such property, including the cost of installing or replacing such property in a new location or new locations, and the cost of any lands or any rights or interests in lands, and any other rights acquired to accomplish such removal, reconstruction, alteration or relocation of such property, less the cost of any lands or any rights or interests in lands or any other rights of the public utility paid to the public utility in connection with removal, reconstruction, alteration or relocation of such property, shall be paid by the housing authority and shall be included in the cost of the redevelopment project. In case of the relocation of any such property the public utility owning or using the same, its successors and assigns, may maintain and operate such property, with the necessary appurtenances, in the new

location or new locations, for as long a period and upon the same terms and conditions as it had the right to maintain and operate such property in its former location.

55:14A:39.1 Discrimination

For all of the purposes of the act to which this act is a supplement, no person shall because of race, religious principles, color, national origin or ancestry be subject to any discrimination.

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BRIEF FOR INTERVENOR, ATTORNEY GENERAL OF NEW JERSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Office Supreme Court, U.S.
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SEP 27 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 342

HARRY J. WILSON, LUCY WILSON, SEBASTIAN C. BRACEY, ALMA D. BURGUM, EARLE B. BURGUM, NORMA JOYCE, CALEB W. JOYCE, DAVID OLIVER DENNIS, JEAN D. DENNIS, NORMAN E. A. PERRY, AGNES M. MAZZEI,

Petitioners,

vs.

THE CITY OF LONG BRANCH, a municipal corporation,

Respondent.

BRIEF FOR INTERVENOR, ATTORNEY GENERAL OF NEW JERSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Deputy Attorney General,
On the Brief.

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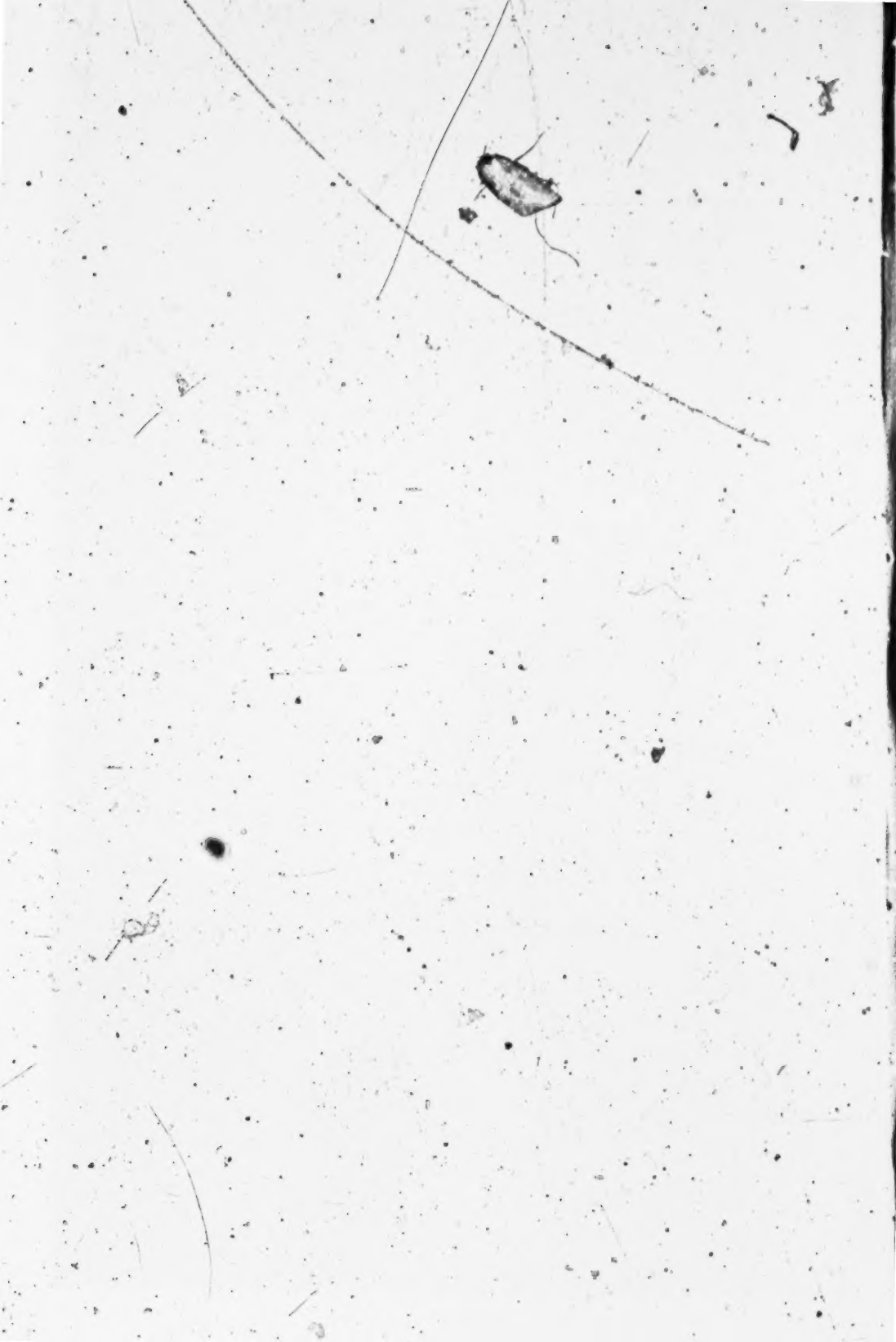

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Questions Presented

1. Whether or not this Court should review a state court determination that the use of the phrase "blighted area" in a state constitution does not preclude legislation defining blighted areas or prescribing standards to guide municipalities in declaring blighted areas?

2. Whether statutory standards defining the conditions under which a municipality may declare an area blighted are inadequate and thus an unconstitutional delegation of legislative authority?

3. Whether the special treatment accorded to public utilities and common carriers and denied to petitioners, *viz.* that the cost of relocation of property of the former be included as part of the over-all cost of the redevelopment program, violates the equal protection clause of the Federal Constitution?

4. Whether a statutory provision that a municipality may declare an area blighted but need not proceed to acquire the properties located in the area is in violation of due process of law as safeguarded by the Fourteenth Amendment?

Statutes Involved

Only one statute is involved, *N.J.S.A.* 40:55-21.1 *et seq.* This Act authorizes the determination and acquisition of blighted areas within a municipality for the public purposes of clearance and redevelopment. After a declaration by a municipality that a particular area is blighted, the municipality may subsequently acquire such property through purchase or eminent domain proceedings. Federal Government financing is thereafter available pursuant to the Federal Housing Act of 1949 (P.L. 171-81st Con.), 42 *U.S.C.A.* Sec. 1401 *et seq.*, Sec. 1451 *et seq.*

Chapter 300 of the Laws of 1949 (*N.J.S.A.* 55:14A-31 to 39) provides an alternative scheme for the acquisition of blighted areas by condemnation for the public purpose of urban redevelopment. The municipal governing body may proceed under *N.J.S.A.* 40:55-21.1 *et seq.* or the Local Housing Authority may condemn the blighted area pursuant to *N.J.S.A.* 55:14A-31 to 39, upon approval of the redevelopment plan by the municipal governing body. Although petitioners briefed the question of invalidity of *N.J.S.A.* 55:14A-31 to 39 before the New Jersey Supreme Court, the question was not raised in the complaint or pretrial order before the Trial Court nor considered by the State Supreme Court in its opinion. Not having been properly raised below, the challenge to this statute should not be considered by this Court.

Statement

The Attorney General intervened in the New Jersey Superior Court, Law Division, to support the constitutionality of Chapter 187 of the Laws of 1949 (*N.J.S.A.* 40:55-21.1 *et seq.*). Such intervention is authorized by New Jersey Supreme Court Rule 4:37-2:

> "When the validity of a statute, executive order, franchise, or constitutional provision of this State is drawn in question in any action to which the State or an officer or agency thereof is not a party, the court shall require notice to be given the Attorney General of the State; and the State shall upon timely application be permitted to intervene in the action. * * *"

The participation in this appeal by the Attorney General is for the single purpose of supporting the constitutionality of the act in question (*N.J.S.A.* 40:55-21.1 *et seq.*).

POINT I

No substantial federal question is presented by petitioners' Point I—Re: Whether or not the determination of public use is for the Legislature or for the courts.

Petitioners argue: (1) that because the term "blighted areas" is contained in the 1947 *New Jersey Constitution*, Art. 8, Sec. 3, Par. 1 (set out in the appendix to this brief), the meaning intended for the word blight must be construed by the judicial branch of the government and not the legislative; (2) that it is for the courts to determine what is a public use. The New Jersey Supreme Court, 27 N. J. 350, 381-382 (reprinted in petitioners' appendix at page 19a), disposed of this contention in the following manner:

> "Finally, plaintiffs urge that because *Art.* VIII, *Sec.* III, *Par.* 1 of the Constitution refers to 'blighted' areas without defining the word, the authority to do so resides in the judicial and not the legislative branch of the government. This is entirely specious. The article declares that redevelopment of 'blighted' areas shall

be a public purpose and authorizes the Legislature to empower municipal governments to undertake such redevelopment. Manifestly, the grant of power contemplated development and implementation by the Legislature. Definition of blight was the ordinary and expected incident of the exercise of that power and no reasonable argument can be made that the connotation ascribed to it overreaches the public purpose sought to be promoted by the Constitution."

We urge that the New Jersey Supreme Court's decision was proper on a question of interpretation by a State court of its own Constitution, which is not subject to review by this Court. *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441, 444 (1915); *Columbus Southern Railway Co.* v. *Wright*, 151 U. S. 470, 475 (1894). The opinion below fully discusses and sustains the validity of the statutory definition of "blighted areas" and declares the act's purpose to be for a public use.

The New Jersey Supreme Court's determination is consistent with the declarations found in *Berman* v. *Parker*, 348 U. S. 26, 32 (1954) (involving a congressional statute and the Federal Constitution) that redevelopment of blighted areas is a public use. See also *United States ex rel. T.V.A.* v. *Welch*, 327 U. S. 546, 551-552 (1946); *Old Dominion Co.* v. *United States*, 269 U. S. 55, 56 (1925). The point presents no substantial federal question.

POINT II

The standards set out in the statute are adequate and clear, and do not present an infringement of the Federal Constitution.

The particular section of the statute setting forth the standards challenged by petitioners is *N.J.S.A.* 40:55-21.1:

"40:55-21.1 'Blighted Area' Defined

As used in this act, the term 'blighted area' shall mean an area in any municipality wherein there exists any of the conditions hereinafter enumerated:

(a) The generality of buildings used as dwellings or the dwelling accommodations therein are substandard, unsafe, insanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living;

(b) The discontinuance of the use of buildings previously used for manufacturing or industrial purposes, the abandonment of such buildings or the same being allowed to fall into so great a state of disrepair as to be untenantable;

(c) Unimproved vacant land, which has remained so for a period of ten years prior to the determination hereinafter referred to, and which land by reason of its location, or remoteness from developed sections or portions of such municipality, or lack of means of access to such other parts thereof, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;

(d) Areas (including slum areas), with buildings or improvements which by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community;

(e) A growing or total lack of proper utilization of areas caused by the condition of the title, diverse

ownership of the real property therein and other conditions, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

Examination of the five subsections confirms that the delegation of authority to municipalities to declare blighted areas is not vague but explicit, not unbridled but held within reasonable bounds. As noted in the opinion below, 27 N. J. 360, 378 (p. 15a of petitioners' appendix), such delegation of authority need not be "marked out with mathematical precision." The statutory definition includes in each instance extensive areas, not isolated blighted areas. There must be a widespread continuing lack of proper maintenance or improvement characteristic of a slum area or a stagnant area in order that the municipal governing body may invoke the statutory procedure for the determination of blight. The purpose is to redevelop entire areas in which the generality of buildings is substandard, unsafe, obsolescent or overcrowded, or in which there are widespread tax delinquencies or unimproved vacant land resulting in stagnancy and unproductiveness.

The petitioners' claim on this point is directly inconsistent with their contention that it is for the courts to define the meaning of "blight." Without a legislative definition of "blighted area", such as that adequately provided in the statute under attack, the municipal governing bodies and planning boards would be groping in the dark in attempting to determine blighted areas.

Not only are the standards under discussion patently sufficient from examination of the language used, but they clearly satisfy the standards required to meet the tests of the Federal Constitution. In *Berman* v. *Parker*, 348 U. S.

26, 28, 35 (1954) this Court had under consideration an act passed by Congress providing for redevelopment of blighted and slum areas in the District of Columbia. The Court noted, at the pages indicated, that the act then being construed did not define either "slums" or "blighted areas", but, nevertheless, held that the standards prescribed were adequate for executing the plan of area redevelopment. If a congressional act, having less explicit standards, meets the requirements of due process in the Federal Constitution, then no objection can be raised to the state legislation. More stringent standards are not to be applied to state statutes, as contrasted to Federal statutes, in their relationship to the Federal Constitution. See *Ill. Rev. Stat.* 1953, c. 67½, secs. 63-91 and *N. Y. Gen. Mun. Law* §72-k, the statutes respectively declared valid in *Chicago Land Clearance Comm'n v. Quinn Home Builders*, 11 Ill. 2d 111, 142 N. E. 2d 60 (Sup. Ct. 1957), cert. den. *sub. nom. O'Donnell v. Chicago Land Clearance Comm'n* 355 U. S. 856 (1957) and *Kaskel v. Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659 (Ct. App. 1953), cert. den. 347 U. S. 934 (1954).

POINT III

The authorization in the blighted area act for the removal, reconstruction or relocation of the property of public utilities or common carriers is not in violation of the equal protection clause of the Fourteenth Amendment.

N.J.S.A. 40:55-21.11 is the section under attack in petitioners' Point III (Petition, p. 22). The argument is that the allocation of the cost of removal and relocation of public utilities or common carriers as part of the total cost of the redevelopment program inures to their special advantage and results in a discrimination against all other

property owners in the blighted areas. This argument of special advantage and discrimination has long been dismissed as unsound when applied to classifications whose peculiar situations provide, in the discretion of the Legislature, a reasonable basis for such treatment. *Missouri* v. *Dockery*, 191 U. S. 165, 171 (1903); cf. *Washington National Ins. Co.* v. *Board of Review*, 4 N. J. 545 (1949).

Legislation containing special provisions for public utilities and common carriers is not unique in New Jersey or elsewhere. The State's interest in public utilities and common carriers has been considered strong enough to, *inter alia*: maintain general supervision and regulation of and jurisdiction and control over all public utilities and their property and equipment, *N.J.S.A.* 48:2-13; fix rates and charges, *R.S.* 48:2-21; and regulate disposition of public utility property, *R.S.* 48:3-7. Legislation of this nature is important to the public interest because of the need to insure both the continuity and adequacy of service.

In *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937), this court had under consideration the validity of the Unemployment Compensation Commission Act of Alabama. The Act was declared constitutional, and in discussing the provisions that the Act should apply only to employers of eight or more persons and that certain classes of employers were to be exempt from enforcement of the statute, the Court held that a legislature may make distinctions in its treatment of particular classifications where there is a rational basis for such treatment. The language of the court at page 510 with regard to the judicial function of review of such classification is definitive:

> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of

laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

The Court had previously held, in *Swiss Oil Corporation v. Shanks*, 273 U. S. 407, 413 (1927) that special treatment of a particular class is not open to objection unless it "precludes the assumption that [it] was made in the exercise of legislative judgment and discretion."

The primary gain from the provision in question is to the public. Instead of compensation paid directly for the properties through the process of condemnation, public utilities and common carriers are recompensed for the cost of redevelopment, reconstruction or relocation of any of their property which interferes in its location with the over-all redevelopment plan. The Legislature has thus eliminated the problem of condemning public utility property without authority to compel the rebuilding and relocation of comparable facilities. The municipal authority granted in section 11 to order the relocation and reconstruction of facilities meets the necessity for continuance of the service during an urban clearance redevelopment program. Beyond dispute, this is a reasonable basis for the Legislature's action in *N.J.S.A.* 40:55A-21.11 in making special provision for the property of public utilities and common carriers situated within areas declared to be blighted.

POINT IV

The determination by a municipality that a particular area is blighted is not a taking of private property without compensation in violation of the Federal Constitution.

Exercise of the provision of the statute in question, so argue petitioners, can result in two situations: (1) an area can be declared blighted and the land subsequently condemned; (2) the area can be declared blighted and no further action taken. There is no question but that the payment of condemnation awards for property included within an area declared blighted is satisfactory compensation for the entire transaction—including the declaration of blight. This proposition is so well established that authorities need not be cited. Petitioners' argument is really directed at the second situation—the declaration of blight which need not be followed by condemnation. The particular provision of the statute setting forth this procedure is *N.J.S.A.* 40:55-21.10 (reprinted in petitioners' appendix at page 49a), stating that, upon a determination of a blighted area, the governing body of the municipality may but shall not be required to acquire the real property within the area by purchase or eminent domain proceedings.

The New Jersey Supreme Court, 27 N. J. 360, 373-375 (reprinted in petitioners' appendix at pages 9a to 11a) disposed of this argument by holding that the declaration of blight is not a taking in the constitutional sense, citing in support *Bauman* v. *Ross*, 167 U. S. 548 (1897) and *Danforth* v. *United States*, 308 U. S. 271 (1939), which are discussed below. Analogy was made to the result flowing from municipal zoning, the court stating that any diminution of market value which can be said to follow from a finding of blight is an incidental loss to which individuals must submit for the public good.

Petitioners' contention in this regard presents an exaggerated construction of the statute which has no reasonable basis in fact. A prime example of such exaggeration is the suggestion, in the third of the questions presented (page 3 of the petition), that after a declaration of blight only a portion of the area might be redeveloped. Neither the statutory language nor judicial determination supports such a claim. Attempting to establish a foundation for their argument, petitioners cite cases (at page 27 of the petition) involving damage to property ensuing from acts of defamation by private parties. Undoubtedly, a knowingly false statement by a private individual causing injury to another's property calls for compensation to the injured party. This cannot be compared, however, to the action taken by a municipality, acting under authority granted to it by the State and exercising a right within the State's police power for the general welfare.

It is our view that the declaration of blight is not a "taking" which requires compensation but merely an "incidental consequence" of the redevelopment program established by statute. In *Bauman* v. *Ross*, 167 U. S. 548 (1897) this Court considered the contention that the filing of a map formulating a general plan for the extension of highways in the District of Columbia was a taking without compensation. The claim was rejected and the Court held that the recording of the map did not in any way interfere with the owner's use of the property involved, stating, at page 596, that it had not "restricted in any way the use or improvement of land by their owners before the commencement of proceedings for condemnation of lands for such highways; nor does it limit the damages to be awarded at such proceedings." The pertinency of the *Bauman* case to the present one, despite petitioners' argument to the contrary, is readily apparent. The New Jersey statute does not in any way restrict the use of property after declara-

tion of blight nor prohibit improvements by the owners of property. Any apprehension that such a declaration will result in a loss of property values is highly speculative. It can as well be said that an increase in value will occur. Mere expectations and speculative interests are not within the shield of the due process clause. See *Currin* v. *Wallace*, 306 U. S. 1, 19 (1939). Since the value of the property will not be established at least until condemnation proceedings are begun, there is no compensable injury to the property.

The doctrine of "incidental consequence" was furthered in *Danforth* v. *United States*, 308 U. S. 271 (1939). In discussing whether interest on an award should run from the time the enabling legislation was passed, the Court held that the mere enactment of legislation authorizing condemnation of property cannot be a taking since such legislation may be repealed or modified, or appropriations may fail. The *Danforth* opinion further declared that until the actual taking (the payment of value), the condemnor may discontinue or abandon his effort. At page 285, it was said "a reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

A declaration of blight is not a taking in any sense and is certainly outside the constitutional language providing for the payment of compensation. Any diminution of property values possibly flowing from a declaration of blight is, as noted by the New Jersey Supreme Court, a limitation of private property rights justifiable under the sovereign's power to meet a public exigency. The determination of a blighted area is a necessary preliminary step in the fulfillment of the legislative objectives of slum clearance and

urban redevelopment. There is no taking of property without compensation or other denial of constitutional rights in that determination. The circumstance that the municipality may not acquire the blighted area according to *N.J.S.A.* 40:55-21.10 cannot retroactively elevate any incidental loss from the declaration of a blighted area into a compensable seizure of private property.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey,
Intervenor,
Attorney pro se.

STEPHEN F. LICHTENSTEIN,
Deputy Attorney General,
On the Brief.

[APPENDIX FOLLOWS]

Appendix

1947 New Jersey Constitution, Art. 8, Section III, paragraph 1:

"1. Blighted areas, clearance, replanning, development; tax exemption of improvements; use, ownership, management and control of improvements

"1. The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for those purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law."

FILE COPY

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FILE COPY

OCT 6 19

JAMES B. BROWN, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 342

HARRY J. WILSON, LUCY WILSON, SEBASTIAN C. BRACEY, ALMA D. BURGUM, EARLE B. BURGUM, NORMA JOYCE, CALEB W. JOYCE, DAVID OLIVER DENNIS, JEAN D. DENNIS, NORMAN E. A. PERRY, AGNES M. MAZZEL,

Petitioners,

against

THE CITY OF LONG BRANCH, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD F. JUSKA,
Attorney for Respondent,
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Long Branch, New Jersey.

CLARKSON S. FISHER,
On the Brief.

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IN THE

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No.

HARRY J. WILSON, LUCY WILSON, SEBASTIAN C. BRACEY, ALMA D. BURGUM, EARLE B. BURGUM, NORMA JOYCE, CALEB W. JOYCE, DAVID OLIVER DENNIS, JEAN D. DENNIS, NORMAN E. A. PERRY, AGNES M. MAZZEI,

Petitioners,

against

THE CITY OF LONG BRANCH, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

Did the City conduct its investigation and hearing according to the enabling acts and were the petitioners denied due process?

Statutes Involved

Respondent, City of Long Branch, agrees with the Intervenor, Attorney General of the State of New Jersey, that the only statute involved is N.J.S.A. 40:55-21.1 *et seq.* It was under this Statute that the municipal governing body and its planning board acted in these proceedings.

Opinions

The Opinion of the New Jersey Supreme Court is officially reported in 27 N. J. 360. It is unofficially reported in 142 A. 2d 837.

The Opinion of the trial court is unreported and is appended to this brief as Appendix A.

Statement

The Respondent, City of Long Branch, in this brief will respond only to the questions raised in Point II of the Petitioners' Brief. The remaining points in Petitioners' Brief attack the constitutionality of the statute involved and their contentions have already been fairly met by the Brief of the Intervenor, Attorney General of New Jersey.

Counter-Statement of Facts

The project area which is the basis of this suit is located on the northerly edge of Long Branch along the Shrewsbury River and it is generally described as follows:

> Beginning at the intersection of the Shrewsbury River and Branchport Creek; thence eastwardly along the Shrewsbury River to the extension of Manhasset Avenue; thence eastwardly along Manhasset Avenue extended and Manhasset Avenue to Patton Avenue; thence westwardly along Patton Avenue to Florence Avenue; thence southwardly along Florence Avenue to Joline Avenue; thence westwardly along Joline Avenue to the westerly bank of Troutman's Creek; thence northwardly along the westerly bank of Troutman's Creek to Atlantic Avenue; thence westwardly along Atlantic Avenue to Branchport Creek and along Branchport Creek to the point or place of BEGINNING.

Following several years of application, conferences, requests, and preliminary surveys done by the Housing Authority with the co-operation of other City officials, the question of whether or not the project area was in a condition of blight was referred to the Planning Board of the City of Long Branch on July 13, 1954. On that date the Board of Commissioners directed the Planning Board, under the authority of N.J.S.A. 40:55-21.1 *et seq.* to conduct a preliminary investigation and hold a hearing leading to a determination and report of the Planning Board as to whether or not the area was blighted under the definition set forth in the statute.

Thereafter this action was commenced. The trial court upheld the finding of blight by the Planning Board and City Commissioners and the trial court's opinion, which is unreported, is presented in its entirety in Respondent's Appendix A.

In Petitioners' factual recital they claim that the Superior Court refused to accept any evidence pertaining to the evidence of blight, but the trial court's function under the statutes existing, and more specifically N.J.S.A. 40:55-21.9, is plain. The statute calls for the Superior Court to make a review of the findings of the Planning Board and City Commission. The trial court found, as did the Planning Board and City Commission, that there was abundant and substantial evidence of blighted conditions. The New Jersey Supreme Court in its opinion concurred with the trial court and with the municipality as to the existence of the blighted conditions. The opinion of the New Jersey Supreme Court shows a careful analysis and review of the facts indicating blight.

The blighted area comprises 100.8 acres; approximately 7.6 acres of this are public rights of way, leaving 93.2 net acres. Of this 59.3% is residential, 7.5% is commercial and vacant land comprises the remaining 33.2 acres; 85 structures are in the area, 70 of which are in residential use. At the time of the institution of these proceedings the City of Long Branch had liens upon or was in possession of title to 34.2 acres for the reason of tax delinquency. The Planning Board found that 41 of the 70 buildings used as dwellings were in such a condition that they fitted within the statutory definition of blight. The 41 dwellings found deficient comprise 58% of all the residential structures; other land totalled 28.4 acres or 21.8% of the gross acreage was blighted because there had been no improvement for the past 10 years and was not likely to be improved. Three of the parcels were low and swampy and because of the diversified ownership, it was unlikely there would be any rehabilitation.

Further 42 acres or 41.7% of the area showed a growing or total lack of property utilization because of title, diverse ownership, and other conditions, which resulted in a stagnant and unproductive condition of potentially useful land.

Petitioners claim that some five years before various municipal bodies had taken steps to declare the area blighted. This is not so, because an examination of the record pointed out by petitioners (R. 153) shows that what took place in 1950 was an attempt by the City Authorities to obtain Federal aid and assistance for this area as well as others, and that no attempt to have the area reviewed by the Planning Board for the purposes involved in this

litigation were taken until the first proceedings in 1954. This statement in petitioners' brief is at the best inaccurate.

The trial court in addition specifically found as a fact that there were no proofs to support the contention that the Planning Board had previously pre-judged the issues involved in the determination of blight.

Petitioners further claim in their statement of facts that the Planning Board received a report of Community Planning Associates, Inc. But determined not to divulge this report or call for testimony. This report was given to the Board by its own retained planning consultant, who was then engaged in preparing a Master Plan for the City. It was appended to the minutes of the Planning Board and there is no proof whatsoever to show that petitioners were ever denied access to those minutes. As a matter of fact they did not even call for them until litigation had begun.

Petitioners' brief states that the New Jersey Supreme Court quoted extensively from a report of a planning consultant which had been controverted. Petitioners had every opportunity to controvert any finding of blight or evidence pertaining thereto at the hearing before the Planning Board. They presented nothing to controvert the report of the planner. They did not present any experts, any engineers, real estate brokers, nor any other testimony to show that blight did not exist. Some of the property owners objecting took the stand and stated that their particular properties, in their opinion, were not blighted. Having not taken advantage of this opportunity they then sought to have the Superior Court go into the question when that Court's duty was only to review the proceedings below.

Petitioners factual recital in its brief supporting this petition at page 7 of the brief, attempts to concisely state the facts. This summation is inaccurate. The facts are these:

1. The area was considered as a whole and was not divided at any time into the areas stated by the petitioners. The area is fully described in this counterstatement of facts. It comprises 100.8 acres.

2. 41 of the 71 dwellings were deficient.

3. 69.7 acres or 74.8% of the net area was in a blighted condition.

4. Both the trial division of the New Jersey Superior Court and the New Jersey Supreme Court found, as a fact, that the area as a whole was blighted sustaining the position of the Municipal Planning Board and the City Commission.

5. The charge that there was pre-judgment of the issue by the Planning Board and City was found specifically not to be a fact by both reviewing courts.

6. The petitioners have been afforded every right and opportunity to be heard since the institution of these proceedings.

7. There has been no prejudice to the petitioners in any stage of these proceedings.

8. If and when the land is taken for public use petitioners' rights are fully protected under the condemnation proceedings.

POINT I

The City conducted its investigation and hearing according to the Enabling Acts and the petitioners were not denied due process of law.

A

Petitioners allege in their brief that the City of Long Branch had determined to take the properties of the petitioners, in other words, they maintain, as they have throughout the proceedings, that both the Planning Board and the City Commission had prejudged the issue. This is not borne out by any of the proofs and the trial court specifically found this charge unfounded (Respondent's Appendix A, page 5a).

Upon review the New Jersey Supreme Court affirmed this finding. The charge is apparently based upon the attempt by the City Officials at the turn of the decade to obtain Federal Funds for the alleviation of the appalling conditions on its riverfront, but instead of being charged with pre-judgment, the City Officials who were in office at that time should be commended for their efforts to alleviate the situation.

B

Petitioners also charge that they had no opportunity to controvert the report of a planning consultant which was made available to the Planning Board in its investigation pursuant to statute. This charge is not only unfounded in fact but it is absolutely incorrect. At the many hearings before the Planning Board the petitioners herein were given every opportunity to be heard, to file any documents they saw fit to introduce, any evidence they required, or

desired to be placed before the Board, to bring in planning and real estate experts, engineers or in fact to do anything that they desired to do or bring before the Board.

Their counsel was refused when he demanded that anyone appearing before the Planning Board should be subjected to cross-examination by him. In fact it is stipulated in the pretrial order in the Superior Court in this cause that persons appearing before the Board were allowed to submit to cross-examination if they desired, but were not required to do so. This ruling was in conformity with N.J.S.A. 40:55-21.6.

C.

The petitioners further charge that the Planning Board improperly received a report from its own planning consultant with respect to the area, and that this was secret evidence. This is completely unfounded. In fact the record is completely barren of any request by the petitioners to see the Planning Board minutes until after litigation had commenced and the investigation was over.

D

Petitioners argue that the hearing before the Planning Board is a quasi-judicial type of hearing, in the absence of being afforded an adversary-type hearing, they are deprived of their property without due process of law. This, however, is not the case at all. It must be remembered that the proceedings under the so-called "Blighted Area Act" N.J.S.A. 40:55-21.1 *et seq.* are steps taken toward a declaration of blight prior to the actual condemnation of the land. Thus at this stage of the proceedings there has been no taking of the petitioners' land because of the mere declara-

tion of blight. These steps are mere procedural conditions which must be met before the land is taken by condemnation. The petitioners' property at this stage has not been taken and in fact might never be taken for the public use.

The New Jersey Legislature has very plainly and clearly set forth the duties of the Planning Board and the City Commission in these matters.

An examination of the Act leads to no other conclusion but that the determination of blight must rest upon the investigation of the Planning Board as to the physical aspects of the project area. N.J.S.A. 40:55-21.2 has reference to this preliminary investigation and reads as follows:

> "The governing body of any municipality, by resolution, may provide for a preliminary investigation of any area in the municipality to determine whether such area is or is not a blighted area as defined in this act. * * *"

This section of the Act displays the legislative intention that the determination by the Planning Board be bottomed upon the investigation.

The statute, of course, is rooted in the New Jersey Constitution, N.J.S.A. Const. art. 8, section 3, art. 1, which states as follows:

> "1. The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for those purposes and uses, or for any of them, may be ex-

> empted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law."

Indeed if the statute had not set forth a requirement for a hearing it still would not offend the due process clause of the Federal Constitution. This is a legislative investigation and not a quasi-judicial inquiry. Justice Francis in his opinion in the New Jersey Supreme Court in this matter clearly and solidly holds this position, and in doing so he is sound. As was stated, these legislative investigations would not offend due process even if a hearing of the type set forth here was not required.

The important decisions of this Court as to whether or not a hearing is even required were early set forth in 1908 in *Londoner* v. *Denver*, 210 U. S. 373, 28 Supreme Court 708, and *Bi-Metallic Inv. Co.* v. *State Board of Equalization*, 239 U. S. 441, 36 Supreme Court 141 (1950).

In *Londoner* v. *Denver*, *supra*, suit was brought by owners to release their lands from assessment of a tax for the cost of paving a street. The procedure taken under the statute in question allowed for the filing of objections and complaints in writing but contemplated no hearing.

> "As it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded at the case at bar, but we think that something more than that, even in proceedings for taxation is required by due process of

> law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations, however brief; and if need be, by proof, however informal. . . ."

It is to be noted at this point that the hearing before the Planning Board provided for under the Statute N.J.S.A. 40:55-21.6 an opening hearing is afforded objectors, the written objections submitted by them must be considered by the Planning Board and the Planning Board must consider evidence adduced in support of the objections so that it is quite clear that the holding in the *Londoner* case has been followed in this matter.

The next matter considered by the Supreme Court with reference to our problem was *Bi-Mettalic Inv. Co. v. State Board of Equalization, supra*, where there was a suit by property owners to enjoin the State Board of Equalization in the Colorado Tax Commission from putting in force an order increasing tax valuation by 40%. The contention there was that there was no opportunity to be heard, but in waiving aside this contention Mr. Justice Holmes speaking for a unanimous court held:

> "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the State power are passed that effect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way

they can be in a complex society, by their power, immediate or remote, over those who make the rule. * * *"

In *Bragg* v. *Weaver*, 251 U. S. 57 (Sup. Ct. 1919), the Supreme Court said in substance that the necessity and the expediency of taking may be determined by such agency and in such mode as the state may designate; and that a hearing on the intended public use is not essential to due process, but that it was essential to due process that the mode of determining compensation requires a hearing. Again this is precisely our question.

In *Hancock* v. *City of Muskogee*, 250 U. S. 454, 39 Sup. Ct. 528 (1919), land owners sought an injunction in Oklahoma to enjoin the city from encumbering lands by a special assessment for the construction of a sewer alleging a violation of the Fourteenth Amendment. The applicable statutes authorized the municipal corporation to establish a general sewer system of public, district and private sewers, the cost of the district sewers to be apportioned against lots in the area. There was no provision in the statute for hearing or notice. The Supreme Court held that no notice or hearing was required; that this was an authorized exercise of the legislative power of the state and further that there was no want of due process because of the mere fact that there was no previous notice to property owners or opportunity to be heard. The Court held in substance that where full legislative power over the subject matter has been conferred by the state upon a municipal corporation, a legislative determination by the local legislative body is of the same effect as though made by the general legislative body.

In *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 67 Law Ed. 1186, 43 Sup. Ct. 689, this court held that it is no longer open to question in the United States Supreme Court that the legislature confer upon a municipality the authority to determine the necessity of the taking for public use for itself. The case states that the question is purely a political one and does not require a hearing, and is not the subject of a judicial inquiry.

In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 53 Sup. Ct. 350, 77 Law Ed. 796 (1933), the duty of the legislative agency to receive and consider evidence with reference to a hearing, provided for in the enabling act, does not per se signify that the hearing is to be of a trial type or adversary type.

Therefore, it seems quite clear that as far as the matter of legislative investigation as to conditions is concerned, no hearing is required at all and if not, it dictates that due process is not offended. *Bragg* v. *Weaver*, *supra*; *Rindge Co.* v. *Los Angeles*, *supra*; *Georgia* v. *Chatanooga*, 264 U. S. 472, 44 Sup. Ct. 369, 68 Law Ed. 796; *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. E. 504 (E. & A., 1935); *David Jeffrey Co.* v. *City of Milwaukee*, 267 Wis. 559, 66 N. W. 2d 362 (1954); *Robinette* v. *Chicago Land Clearance Commission*, 115 Fed. Sup. 669 (1951), *motion for leave to file petition for writ of mandamus denied* 342 U. S. 940.

Therefore the type hearing provided in our statute, specifically N.J.S.A. 40:55-21.6 (Petitioners' Appendix E; p. 47a) provides a legislative type hearing at which all persons who are interested are heard, all written objections considered, and any evidence produced by the objectors is received. As Justice Francis said in his opinion in this

cause in the New Jersey Supreme Court the Act fairly "breathes" the intent the Planning Board should hold a legislative type hearing.

Petitioners contend that the Planning Board considered matters not adduced at this hearing, but even so, this is proper. It is to be remembered that the Act calls for the determination of blight to be grounded upon the investigation by the Planning Board. The facts showing blight in this area were reviewed by the Superior Court of New Jersey, Law Division, Ewart, J. S. C. (Respondent's Appendix A, p. 13a, '8) who found abundant evidence of blight. The facts of blight were again gone into on the record by the New Jersey Supreme Court and appear in Justice Francis's opinion (Petitioners' Appendix A, pp. 31a to 35a). The evidence of blight in the area is not a question which should detain this Court. See *Despatchers Cafe Inc. v. Somerville Housing Authority*, 332 Mass. 559 (1955) and *Kaskel v. Impellitteri, Mayor, et al.*, 121 N. Y. S. 2d 848 (1953).

It is therefore abundantly clear that the proceedings taken by the City in this cause, under the provisions of the applicable enabling act, was a legislative type investigation and patently did not call for a trial type hearing and therefore no question arises under the Fourteenth Amendment of the United States Constitution.

Finally, if and when the City takes petitioners' land for the public use, the petitioners will, of course, be afforded the full trial type hearing if they desire at the condemnation proceedings, and, of course, under our existing law may even obtain a jury trial, thus affording them due process and full protection of all their rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. JUSKA,
Attorney for Respondent.

CLARKSON S. FISHER,
On the Brief.

[APPENDIX FOLLOWS]

APPENDIX

Opinion

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, MONMOUTH COUNTY

Docket No. L1580-55-P.W.

Civil Action

HARRY J. WILSON, *et al.*,

Plaintiffs,

vs.

CITY OF LONG BRANCH, a municipal corporation,

Defendant.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, MONMOUTH COUNTY

Docket No. L1661-55-P.W.

FRANK MEAD, *et al.*,

Plaintiffs,

vs.

CITY OF LONG BRANCH, a municipal corporation,

Defendant.

Appendix A

HARRY LANE, JR., ESQ.

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Attorneys for Plaintiffs

EDWARD F. JUSKA, ESQ.

CLARKSON S. FISHER, ESQ.
Attorneys for Defendants

GROVER C. RICHMAN, Attorney General

DAVID D. FURMAN, Deputy Attorney General
Attorneys for the State.

EWART, J. S. C.

The two suits entitled as above have been consolidated for the purpose of trial. Plaintiffs are property owners and taxpayers within the so-called blighted area of the City of Long Branch and have brought these suits, in lieu of prerogative writs, to review the validity of a resolution adopted by the Planning Board of the City of Long Branch on September 8, 1955 determining a certain area within the city to be blighted within the meaning of N. J. S. 40:55-21.1 et seq., and of a concurring resolution adopted by the Board of Commissioners of the city on October 4, 1955. Such review is authorized by N. J. S. 40:55-21.9. (see also R. R. 4:88).

The area determined to be blighted comprises approximately one hundred acres located in the northerly section of the city fronting on the Shrewsbury River and upon Troutman Creek, and is described as follows:

> Beginning at the intersection of the Shrewsbury River and Branchport Creek; thence eastwardly along the Shrewsbury River to the extension of Manhasset Avenue; thence eastwardly along Man-

Appendix A

Hasset Avenue extended and Manhasset Avenue to Patten Avenue; thence westwardly along Patten Avenue to Florence Avenue; thence southwardly along Florence Avenue to Joline Avenue; thence westwardly along Joline Avenue to the westerly bank of Troutman's Creek; thence northwardly along the westerly bank of Troutman's Creek; thence northwardly along the westerly bank of Troutman's Creek to Atlantic Avenue; thence westwardly along Atlantic Avenue to Branchport Creek and along Branchport Creek to the point and place of beginning.

Proofs submitted at the hearings before the Planning Board disclosed that the so-called blighted area comprises a total of 100.8 acres, with approximately 7.6 acres in public rights of way, leaving 93.2 net acres, and that of the net acreage 59.3% is in residential use; 7.5% is in commercial use; and 33.2% is vacant land. There are 85 structures located within the area, 70 of which are in residence use.

The area in question is graphically illustrated by Exhibits P27, P30, and a large aerial photograph marked Ex. P15. A number of large photographs stapled together and marked Ex. P28 depict various delapidated structures in the area, a portion of the river front, and various scenes that were placed in evidence before the Planning Board in support of the contention that the area was blighted. And a number of smaller photographs placed in evidence by the plaintiffs in these suits, and marked as exhibits, depict various buildings owned by the plaintiffs who were objectors before the Planning Board in support of plaintiffs' contention that the area is not blighted within the intent of the statute.

An ordinance adoped by the City Commissioners on July 6, 1954, (Ex. P3), pursuant to L.1953, c.433, created a Planning Board of nine members pursuant to section 14

of that Act. By resolution adopted February 15, 1955 the Board of Commissioners of the City of Long Branch requested the Planning Board to conduct a preliminary investigation and to hold public hearing on the question of blight pursuant to the provisions of R.S.40:55-21.1 et seq.

Hearings were had before the Planning Board in the City Hall at Long Branch on May 3, May 17, May 25, June 8, June 22, July 13, and August 2, 1955. However, no proofs were heard at the hearings on June 8 and June 22. At those hearings before the Planning Board numerous photographs and other exhibits were introduced by both sides to the controversy and a total of twenty-five people were heard pro and con at said hearings. People who spoke before the Planning Board were not sworn as witnesses and the Planning Board ruled that they were not compelled to submit to cross-examination unless they wished to submit. At the various hearings the chairman of the Planning Board repeatedly invited anyone present to speak on the subject and accorded everyone so desiring a full opportunity to be heard.

At the conclusion of the hearings before the Planning Board and on September 8, 1955 the board adopted a resolution determining the area to be blighted within the meaning of the statute, N. J. S. 40:55-21.1 et seq. and submitted the matter to the City Commissioners for approval, disapproval or modification. On October 4, 1955 the City Commission adopted a resolution approving and concurring in the determination of the Planning Board.

It should be noticed that similar action, later rescinded, had been taken in the year 1954. By resolution adopted July 13, 1954 the City Commissioners referred to the Planning Board the question of blight; a hearing was held by the Planning Board on September 9, 1954; on September 30, 1954 the Planning Board adopted a resolution de-

mining the area to be blighted; September 21, 1954 the City Commission adopted a resolution approving and concurring in the determination of blight; October 11, 1954 a suit to review the validity of the action was instituted by Wilson, et al.; October 16, 1954 a similar suit was instituted by Mead, et al.; February 14, 1955 a resolution was adopted by the Planning Board rescinding its earlier resolution of September 20, 1954, and on February 15, 1955 the City Commission adopted a resolution rescinding its earlier resolution of September 21, 1955. Then on February 16, 1955 Judge Lloyd signed an Order dismissing both suits and on July 21, 1955 the Appellate Division of the Superior Court affirmed Judge Lloyd's action. Then, as aforesaid, by a new resolution adopted February 15, 1955 the City Commissioners again referred the question to the Planning Board anew with the request to conduct hearings, etc.

These cases were pretried together on September 10, 1956 and were tried at Freehold before the court on February 4, 5, 6 and 14, 1957. At the trial plaintiffs in the present suits called fourteen witnesses and placed 40 exhibits in evidence but the defendant called no witnesses and placed in evidence 8 exhibits in addition to those which had been placed in evidence before the Planning Board. Transcripts of the proceedings at the various hearings before the Planning Board were marked in evidence in the Pretrial Order.

Paragraph 4 of the pretrial Order contains the following admissions by the parties:

> "4 All parties admit that the pltfs in the two suits were and are owners of property within the area determined to be blighted; that pltfs made protests before the Board of Commissioners sufficient to warrant the institution of these suits; that both suits were instituted within the 30 day limitation period set forth in the statute; that the resolutions

of the Planning Board and of the City were in fact adopted on the dates above set forth; that the said Planning Board did instruct persons appearing before it at said public hearings that they were not required to submit to cross examination, but that they might submit to such cross examination if they desired; and that with respect to certain persons subpoenaed by pltfs in the name of the Planning Board to attend hearings before said Planning Board, the Board stated publicly that it had no power to issue subpoenaes and it would not honor them, and that persons upon whom subpoenaes had been served might honor them or not, as they chose."

Plaintiffs make the following contentions:

1. That by R.S.40:55-21.8 further proceedings by the governing body upon such determination of blight are prohibited during the pendency of the suits to review such determination; that in the 1954 proceedings suit was instituted by Wilson, et al. on October 11, 1954 and by Mead, et al. on October 16, 1954, and that notwithstanding the pendency of those suits (which were not dismissed until February 16, 1955), the Board of Commissioners nevertheless on February 15, 1955 adopted a resolution rescinding the earlier concurrence in determination of blight and again referred the matter to the Planning Board to conduct preliminary investigation, hold hearings, etc.

2. That contrary to the statute and to plaintiffs' rights under both the State and Federal Constitution the Planning Board refused plaintiffs' requests to subpoena witnesses for the objectors at the hearing before the Planning Board and informed persons subpoenaed by the objectors that the subpoenaes need not be honored and further informed witnesses who appeared at the public hearings before the

Planning Board that they were not required to take the stand and testify, and further informed witnesses that they were not compelled to submit to cross examination.

3. That the Planning Board in connection with the public hearings received and accepted reports, findings and statements of other persons and bodies which were not competent or substantial evidence and refused plaintiffs' requests to examine such persons and members of the bodies which had made said reports and findings.

4. That the Planning Board had previously prejudged the issues involving the questions of blight and failed to act as a quasi-judicial body.

5. That the Planning Board improperly and illegally considered matters de hors the record in arriving at its conclusion and determination of blight.

6. That certain members of the Planning Board were disqualified from voting because of personal interest and were nevertheless improperly and illegally consulted by other members of the Board.

7. That members of the Planning Board qualified to vote consulted with other members of the Board who had not attended all of the hearings at which evidence was given.

8. That there was no substantial evidence to support the determination of blight.

9. That the resolution determining blight was not adopted by a majority of the Planning Board and that there were an insufficient number of members of the Planning Board who attended all of the hearings to warrant the

board in adopting the resolution determining the existence of blight.

10. That the Board of Commissioners of the city in adopting the concurring resolution on October 4, 1955 acted improperly in that they had already prejudged the case and did not base their determination upon matters developed at the hearings before the Planning Board.

11. That the statute, (N.J.S. 40:55-21.1) is unconstitutional in that its title embraces more than one subject and embraces objects not set forth in its title.

12. That the statute last mentioned violates both the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Section 1 of the New Jersey Constitution in that it fails to provide for due process in the taking of private property.

13. That the statute mentioned is unconstitutional in that it permits the taking of private property without just compensation.

14. That the statute in question is unconstitutional in that it permits the taking of private property for other than state or municipal use, namely for development by private capital and for pecuniary profit of private persons.

15. That the statute is invalid in that it sets up no proper standards for determination of whether or not a particular area is blighted.

16. That the statute is invalid because it sets up certain methods and provisions relating to appeals that are not in conformity with and go beyond the rules established by the Supreme Court, and those things being matters of procedure are beyond the power of the Legislature.

17. That the statute in question is invalid because it does not require the municipality to acquire and pay for property in the area determined to be blighted and that a determination of blight amounts to a taking and plaintiffs are therefore deprived of their property without due process.

18. That the statute is invalid in that it does not provide for due process in the constitutional sense because it fails to afford the objectors a proper opportunity of presenting their objections; fails to provide for compulsory process to witnesses and fails to provide for cross examination of witnesses at the hearings before the Planning Board.

19. That the statute fails to make proper provision for notice to property owners who may have their property taken and that not all property owners within the area received even the notice provided for by statute prior to the public hearings.

20. That there was a failure to comply with the statutory provision requiring notice of the action to be taken to be given to those affected by serving upon them a copy of the resolution adopted.

Many of the points raised by plaintiffs were considered and disposed of in *Sorbino, et al. v. City of New Brunswick, et al.*, 43 N. J. Super. 554, (Law Div. 1957). Plaintiffs appear to base much of their argument upon the assumption that the hearings conducted by the Planning Board were quasi-judicial in nature and that the standards essential to a judicial or quasi-judicial proceeding must be adhered to. However, it will be noted that the statute, (N.J.S. 40:55-21.2) provides for a preliminary investigation to determine whether a particular area is or is not a blighted area within the definitions of the Act; provides in section

4 of the Act for a public hearing; requires by section 5 of the Act notice of hearing by publication for two weeks and by mailing of notice of hearing to the last owner of each parcel of property within the area as shown by the assessment records, but that failure to mail any such notice shall not invalidate the investigation or determination thereon. The statute also provides in section 7 that a determination made by the Planning Board shall be subject to approval, disapproval or modification by the governing body of the municipality. Sections 8 and 9 of the Act provide for review by suit in the Superior Court, and section 10 provides that if the determination shall be that an area is blighted then the governing body of the municipality may, but shall not be required to, acquire the real property within the said area by purchase, or by eminent domain proceedings, and may proceed with the clearance, replanning, development or redevelopment of the area as a public purpose and for public use, or the governing body may by resolution agree that a private corporation may undertake such clearance, replanning, development or redevelopment in accordance with the statutory authority and subject to the provisions of paragraph 1, section 3, article 8 of the New Jersey Constitution.

It will be observed that the statute confers upon the Planning Board no power to issue subpoenaes, or to swear witnesses, nor to make orders or render any judgments. On the contrary, the statute contemplates that the Planning Board shall conduct an investigation, hold public hearings, reach certain factual determinations and submit its findings and determinations to the governing body in the form of a report, whereupon the governing body may approve, disapprove or modify the findings of the Planning Board. It seems to me perfectly apparent that the Planning Board in conducting hearings was not acting in a quasi-judicial capacity but was acting merely as a legislative fact finding agency preliminary to and in aid of further action to be

taken at a later date by the governing body. The Planning Board had no authority to and did not presume to determine whether plaintiffs' several properties should be taken for public use. It merely determined, after investigation and hearing, that certain facts and conditions existed in the area in question and that the conditions enumerated in section 1 of the Act, having been found to exist, the area was in fact a blighted area within the meaning of the statute.

The standards of conduct of such hearings before legislative or administrative agencies is illustrated by the following cases: *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 523 (E. & A. 1935); *Ryan* v. *Housing Authority of Newark*, 125 N. J. L. 336 (Supreme Court 1940); *Save Our Homes Council* v. *Central Planning Board of Newark*, in which a written opinion was filed by Judge William X. Smith in the Law Division in 1953, Docket L 8220-51-P.W. (not reported); *Norwegian Nitrogen Products Co.* v. *United States of America*, 288 U. S. 294 (1933); *State Ex Rel. Dalton* v. *Land Clearance & Redevelopment Authority of Kansas City*, 270 S. W. 44.

I deal with the plaintiffs' points enumerated above as follows:

1. The prohibition contained in section 8 of the Act against further proceedings by the governing body upon such determination of blight during the pendency of the suit, refers to further proceedings under sections 10 and 11 of the Act and does not purport to prohibit rescission of the prior proceedings and the initiation of a new investigation by the Planning Board. The prior suits instituted in 1954 were dismissed at the instance of the municipal authorities on February 16, 1955, and the action of Judge Lloyd in dismissing the prior suits was affirmed by the Appellate Division. I conclude there is no merit in this point.

2. There is no provision in the statute empowering the Planning Board to subpoena witnesses or to swear wit-

nesses. In fact, the statute does not require the Planning Board to take testimony either sworn or unsworn. Power to compel attendance and testimony of witnesses by administrative agencies is dependent upon the provisions of the statute, 42 Am. Jur., page 415, section 88. The hearing before the Planning Board was not a quasi-judicial hearing; on the contrary, the Planning Board was merely acting as a legislative fact-finding agency preliminary to and in aid of further action at a later date by the governing body. *Sorbino* v. *New Brunswick*, *supra*. In such legislative investigation not even a hearing is essential to due process under the Constitution. *Ryan* v. *Housing Authority of Newark*, *supra*. And a hearing on notice, essential to judicial proceedings, is not indispensable in such legislative investigation. *Jamouneau* v. *Harner*, 16 N. J. 500 (1954).

I conclude there is no merit to plaintiffs' point number 2.

3. In view of the fact that the Planning Board was not acting in a quasi-judicial capacity, but was conducting a legislative hearing, I can see no legal objection to the Planning Board having accepted reports, findings and statements based upon surveys by the Housing Authority and other agencies.

4. There are no proofs to support the contention that the Planning Board had previously prejudged the issues involved in the determination of blight.

5. I find no proof supporting the contention that the Planning Board improperly and illegally considered matters outside of the record in arriving at its conclusion.

6. I think there is no adequate proof to show that any members of the Planning Board were disqualified by reason of personal interest in participating in the proceedings

leading to a determination that the area in question was blighted.

7. In view of the fact that the proceedings by the Planning Board were in the nature of a legislative investigation, I see no objection to certain members of the Planning Board having consulted with other members, some of whom had not attended all of the hearings before the Planning Board.

8. My review of the record made before the Planning Board leads me to the conclusion that there was both abundant and substantial evidence to support the findings that the area in question was blighted within the meaning of the statute. I refer particularly to the group of photographs stapled together and marked Ex. P-26.

9. The Planning Board consists of nine members and at its meeting on September 6, 1955 eight out of the nine were present. The minutes of that meeting of September 6th, (part of Ex. B-20), reveal that a motion was made to declare the area in question a blighted area. On roll call four voted aye; two voted no, and two abstained from voting. Then on motion duly made and passed the Board's counsel was directed to draw up "the findings and deliberations of the Board and file the same with the City Commissioners". The meeting of September 6th was adjourned to September 8th to afford counsel an opportunity to draw formal resolution and report, which counsel did, and presented at the meeting held on September 8th, 1955 at the Garfield Grant Hotel in Long Branch. At that meeting, five members of the Planning Board were present. The resolution was presented, read and on roll call vote there were four votes in the affirmative and one in the negative. The one negative vote was by Mr. Maurer who had also voted no at the meeting of September 6th. Thus a quorum of the Planning Board was present at both

the meetings of September 6th and September 8th. And at the meeting of September 6th out of eight members present there were only two negative votes. I regard the meeting of September 6th as the meeting at which it was finally determined to declare the area a blighted area. Generally speaking, authority vested in a Board or Commission for public purposes may be executed by a majority of the members if all have had notice of the meeting or opportunity to act and a quorum be present, even though a minority dissent. *42 Am. Jur., page 385, section 72.* I conclude that the determination of blight was in fact voted by a majority of the Board.

10. I find no proof to support the allegation that the Board of Commissioners had prejudged the case prior to adoption of their concurring resolution on October 4, 1955.

11, 12 & 13. These points respecting the constitutionality of the statute, (N.J.S. 40:55-21.1) were considered and disposed of in *Sorbino* v. *City of New Brunswick, supra*, in which it was adjudged that the statute was constitutional.

14. The statute is not unconstitutional because it permits development of the blighted area by private capital. The whole statutory scheme looking to the clearance and redevelopment of a blighted area is to serve public needs and purposes. Both the Constitution, paragraph 1, section 3, article 8, and section 10 of the statute authorize the clearance and redevelopment either by the municipality itself or by a private corporation to whom the municipality may delegate the matter. After acquisition of private property for public purpose, actual fulfillment of that public purpose may be entrusted to a private agency. *City of Trenton* v. *Lanzaro*, 16 N. J. 465 (1954). *Redevelopment of City and County of San Francisco* v. *Hayes*, 122 Cal. App. 2d 777; 266 Pac. 2d 105 (Dist. Ct. Cal. 1954).

15. Section 1 of the Act does set up particular standards for a determination of whether or not an area is blighted. See *Sorbino* v. *City of New Brunswick, supra.*

16. I find no essential difference between the procedure for review authorized by sections 8 and 9 of the statute and those provided for by R.R. 4:88. Both contemplate a review in the Superior Court by suit instituted within thirty days of the action to be reviewed.

17. There is no reason why the statute should require the municipality to acquire and pay for property located in an area determined to be blighted. The mere determination that an area is blighted does not constitute a "taking". *Sorbino* v. *City of New Brunswick, supra.*

18. The objections enumerated under point 18 relating to process to secure witnesses, cross examination, etc., have been dealt with above.

19. Section 5 of the statute does provide for notice of hearing and proofs were submitted to show that notice was duly published and mailed to property owners within the area as required by the statute. However, the statute itself provides that failure to mail notice shall not invalidate the investigation or determination thereon and furthermore a hearing on notice that is essential to a judicial hearing is not indispensable in such legislative investigation as that with which we are here concerned. *Jamouneau* v. *Harper, supra.*

20. I recollect no proof to support the charge that adequate notice required by the statute was not given.

For the reasons stated, judgment of dismissal will be entered against the plaintiffs.

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